

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANIEL R. COUSINS,	§	
	§	No. 593, 2003
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and
v.	§	for Sussex County in IS00-02-
	§	0112R1 - 0115R1.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0002004173

Submitted: January 29, 2004
Decided: May 13, 2004

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

ORDER

This 13th day of May 2004, upon consideration of the appellant's opening brief and appendix and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The appellant, Daniel R. Cousins, filed this appeal from an order of the Superior Court denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (Rule 61). The appellee, State of Delaware, has moved to affirm the judgment of the Superior Court on the basis that it is manifest on the face of Cousins' opening brief that the appeal is without merit. We agree and AFFIRM.

(2) In March 2000, Cousins was indicted on two counts of Rape in the First Degree, one count of Rape in the Fourth Degree, and one count of Unlawful Sexual Contact in the Second Degree. After a jury trial in the Superior Court, Cousins was found guilty as charged. He was sentenced in November 2000, to a total of sixty-seven years at Level V, suspended after serving thirty years, for one year at Level IV home confinement, followed by probation. On direct appeal, this Court affirmed Cousins' conviction.¹

(3) In October 2002, Cousins moved *pro se* for a judgment of acquittal. The Superior Court summarily denied the motion as untimely. In September 2003, Cousins moved *pro se* for postconviction relief. The Superior Court denied the motion on the bases that the issues raised were procedurally barred pursuant to Rule 61(i)(3)² and (4)³ or were without merit. This appeal followed.

(4) On appeal, Cousins raises fourteen separate claims, about half of which concern the admissibility of a videotaped interview of the child victim.

¹*See Cousins v. State*, 2001 WL 1353571 (Del. Supr.).

²Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is barred, unless the petitioner can establish cause for the procedural default and prejudice from the violation of the petitioner's rights.

³Rule 61(i)(4) bars a claim that is formerly adjudicated unless reconsideration of the claim is warranted in the interest of justice.

Cousins also raises as grounds for relief (a) the Superior Court's voir dire of the child victim, (b) prosecutorial misconduct, (c) double jeopardy due to multiplicity of charges, (d) ineffective assistance of counsel, and (e) newly discovered evidence.

(5) Cousins' claims with respect to the videotaped interview may be summarized as follows: (a) the videotape interview did not meet the standards of title 11, section 3511 of the Delaware Code⁴ and Superior Court Criminal Rule 15⁵; and (b) it was improper to allow the jury to replay the videotape in the deliberation room. Cousins also complains that the Superior Court did not separately address each of his videotape claims when disposing of the postconviction motion.

(6) The record reflects that the five-year old child victim was interviewed at the Children's Advocacy Center (CAC) on February 7, 2000 concerning the events of February 6, 2000, that led to the charges against Cousins. At trial, a videotape of the CAC interview was admitted into evidence without objection and was played for the jury. Moreover, the videotape of the

⁴Title 11, section 3511 of the Delaware Code permits the use of videotaped testimony in lieu of live testimony by an available witness under the age of twelve years.

⁵Superior Court Criminal Rule 15 provides for the taking of depositions in criminal cases.

interview, as well as video equipment, was provided to the jury prior to its deliberations.

(7) We agree that Cousins' claims with respect to the videotape interview are properly barred pursuant to Rule 61(i)(3). It was not error for the Superior Court to provide the videotape of the interview to the jury during its deliberations. Physical evidence admitted against a defendant at trial is appropriately submitted to the jury during its deliberations at the judge's discretion.⁶

(8) Moreover, notwithstanding Cousins' contrary contentions, the videotape of the CAC interview was not a deposition and thus was not subject to the requirements of title 11, section 3511 of the Delaware Code and Superior Court Criminal Rule 15. Rather, the videotape was properly admitted into evidence in accordance with the requirements of title 11, section 3507 of the Delaware Code.⁷

⁶*See, e.g., Smith v. State*, 2000 WL 33726919 (Del. Super.) (denying as without merit and as procedurally barred postconviction claim that Court erred when allowing jury to take videotape into deliberations), *aff'd*, 2000 WL 1887933 (Del. Supr.).

⁷Title 11, section 3507 of the Delaware Code provides that “[i]n a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.” *Compare Feleke v. State*, 620 A.2d 222 (Del. 1993) (affirming admission of child's out-of-court taped statement pursuant to tit. 11, § 3507).

(9) Finally, we conclude that the Superior Court properly combined and appropriately addressed Cousins' separate postconviction arguments that pertained to the admissibility of the videotaped interview. Cousins' claim to the contrary is without merit.

(10) Cousins contends that the jury was improperly excluded from hearing the Superior Court's voir dire of the five-year old child victim. The Superior Court ruled, however, and we affirm, that this claim is procedurally barred pursuant to Rule 61(i)(3). The Superior Court did not abuse its discretion by conducting the voir dire outside of the presence of the jury.⁸ Before allowing the child to testify, the trial judge advised the jury of its responsibility to determine the child's credibility and the weight afforded to her testimony.⁹

(11) Cousins claims in this Court, as he did in his postconviction motion, that the prosecutor orchestrated the testimony given by the State's witnesses. The Superior Court properly barred this claim under Rule 61(i)(3). Cousins established no basis for the claim and thus did not demonstrate either for failure to raise the claim or actual prejudice.

⁸*DeShields v. State*, 2001 WL 1560689 (Del. Supr.)

⁹*Feleke v. State*, 620 A.2d 222, 226 (Del. 1993).

(12) In this appeal from the denial of postconviction relief, Cousins reiterates his claim that the prosecutor made improper statements during closing argument. As the Superior Court determined, however, Cousins' contentions were raised on direct appeal and thus are barred as formerly adjudicated pursuant to Rule 61(i)(4). Reconsideration of the formerly adjudicated claim is not warranted simply because Cousins has refined or restated the claim.¹⁰

(13) The Superior Court properly barred, pursuant to Rule 61(i)(3), Cousins' claim that he was subject to double jeopardy by reason of multiplicity of charges in the indictment.¹¹ The evidence clearly established that separate sexual acts and crimes took place when Cousins molested the child victim during the evening of February 6, 2000.¹²

(14) Cousins' claims of ineffective assistance of counsel are fairly summarized as follows: (a) trial counsel failed to prepare, investigate, interview and depose key witnesses; (b) trial counsel failed to "secure parental DNA profiles"; (c) trial counsel allowed an "improperly produced deposition"

¹⁰*Collingwood v. State*, 2000 WL 1177630 (Del. Supr.).

¹¹The multiplicity doctrine is implicated when a single criminal offense is divided into multiple counts of an indictment, thereby violating the double jeopardy provisions of the United States Constitution and the Constitution of the State of Delaware.

¹²*Feddiman v. State*, 558 A.2d 278 (Del. 1989)

to be entered into evidence; and (d) trial counsel failed to disclose to Cousins that he had been disciplined by this Court.

(15) To substantiate his claims of ineffective assistance of counsel, Cousins must show that his counsel's representation fell below an objective standard of reasonableness that was prejudicial to Cousins in such a way that the outcome of the trial would have been different.¹³ The review of counsel's representation is subject to a strong presumption that the representation was professionally reasonable.¹⁴

(16) The Superior Court reviewed the allegations of ineffective assistance of counsel and properly determined that Cousins did not establish that his counsel's representation was unreasonable and prejudicial. Specifically, the Superior Court determined, and we agree, that counsel was not ineffective in securing witness testimony. Cousins did not show what the potential testimony would have been or how it would have been helpful to the defense at trial. Nor do we find that counsel was ineffective for failing to obtain DNA testing to corroborate Cousins' claim that he had sexual intercourse with his girlfriend in the same bathroom in which he was found

¹³*Strickland v. Washington*, 466 U.S. 668 (1984).

¹⁴*Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

with the child victim. Moreover, counsel was not ineffective when he failed to object to the admission of the CAC videotape interview that was properly admitted pursuant to section 3507. Finally, Cousins failed to demonstrate actual prejudice stemming from counsel's alleged failure to disclose to him a prior attorney disciplinary matter in which counsel was involved.

(17) Finally, it is clear that the Superior Court properly exercised its discretion when denying Cousins' request for a new trial based on newly discovered evidence. Cousins' newly discovered evidence consisted merely of an unverified letter containing inadmissible hearsay.¹⁵

(18) The Court has carefully considered Cousin's postconviction claims on appeal, and we find that the judgment of the Superior Court should be affirmed. It is manifest on the face of Cousins' opening brief that this appeal is without merit. The issues presented on appeal clearly are controlled by settled Delaware law. To the extent judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's' motion to affirm is GRANTED. The judgment of the Superior Court is affirmed.

¹⁵See *McCray v. State*, 2001 WL 760845 (Del. Supr.) (rejecting claim of newly discovered evidence based solely on unverified letters).

BY THE COURT:

/s/ Myron T. Steele
Justice