

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID MERRITT,	§	
	§	No. 53, 2013
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in and
v.	§	for New Castle County
	§	Cr. ID No. 0903001739
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: July 5, 2013
Decided: September 24, 2013

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

ORDER

This 24th day of September 2013, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, David Merritt, filed this appeal from the Superior Court's January 25, 2013 denial of his first motion for postconviction relief under Superior Court Criminal Rule 61 ("Rule 61"). We conclude there is no merit to the appeal and affirm the Superior Court's judgment.

(2) The record reflects that, on March 1, 2010, a Superior Court jury convicted Merritt of eight counts of Rape in the First Degree and one count of Continuous Sexual Abuse of a Child. On May 14, 2010, the Superior

Court sentenced Merritt to a total of 127 years at Level V. On direct appeal, we affirmed the Superior Court's judgment.¹

(3) Merritt filed his motion for postconviction relief in December 2011. The motion, as later amended in May 2012, raised the following seven claims: (i) inaccurate and untimely trial transcripts; (ii) prosecutorial misconduct; (iii) trial judge error when failing to strike prosecutor's improper questions or give a curative instruction; (iv) insufficient evidence of penetration; (v) flawed indictment and improper amendment of indictment; (vi) improper trial judge *ex parte* contact with jury, and (vii) ineffective assistance of trial and appellate counsel. Merritt also sought the appointment of counsel and an evidentiary hearing.

(4) Merritt's postconviction motion, amendment, and related motions were referred to a Commissioner for a report and recommendation. At the Commissioner's direction, Merritt's trial and appellate counsel filed an affidavit in response to the ineffective assistance of counsel claims, and the State filed a response and supplement to the postconviction motion as amended. Merritt also filed a reply.

(5) By report dated November 20, 2012, the Commissioner recommended that Merritt's postconviction motion should be denied on the

¹ *Merritt v. State*, 2011 WL 285097 (Del. Jan. 27, 2011) (Holland, J.).

grounds that the ineffective assistance of counsel claims were without merit and that the remaining claims were procedurally barred under Rule 61(i)(3) without exception.² After considering Merritt’s objections to the report and the State’s response to the objections, the Superior Court, upon *de novo* review, adopted the Commissioner’s report and denied Merritt’s postconviction motion. This appeal followed.

(6) Having carefully considered the parties’ briefs and the record of Merritt’s trial, we conclude that the Superior Court’s judgment should be affirmed on the basis of the January 25, 2013 order that adopted the Commissioner’s well-reasoned report and recommendation. On appeal, Merritt argues only that his trial counsel “failed to contemporaneously object to the State’s failure to produce sufficient evidence to establish penetration.”³ Simply stated, Merritt’s claim does not withstand scrutiny under *Strickland*.⁴ Our review of the record reveals no evidence that Merritt’s trial counsel’s representation was deficient or that any alleged error

² *State v. Merritt*, 2012 WL 5944433 (Del. Super. Comm’r Nov. 20, 2012).

³ Merritt’s other claims are deemed waived and will not be addressed by the Court. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

⁴ *See Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984) (holding that a defendant claiming ineffective assistance of counsel must demonstrate that counsel’s representation fell below an objective standard of reasonableness and was prejudicial, *i.e.*, that but for counsel’s errors, there is a reasonable probability that the outcome of the proceeding would have been different).

on the part of trial counsel affected the outcome of Merritt's trial or direct appeal.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice