IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELMER DOBSON,	§	
	§	No. 617, 2012
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for Sussex County
v.	§	
	§	
STATE OF DELAWARE.,	§	No. 1112004250
	§	
Plaintiff Below-Appellee.	§	

Submitted: September 18, 2013
Decided: October 31, 2013

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

O R D E R

On this 31st day of October 2013, it appears to the Court that:

(1) Defendant-below/Appellant Elmer Dobson appeals from a Superior Court jury conviction of six counts of Rape in the Second Degree and one count of Endangering the Welfare of a Child. Dobson raises three claims on appeal. First, he contends that the trial judge committed plain error when he allowed evidence of other crimes for which he was not indicted into evidence. Second, Dobson argues that the trial judge committed plain error when he sent the indictment to the jury without clarifying which alleged occurrences were being charged in Counts 5 and 6. And third, he argues that the trial judge committed error when he sustained the State's objection to the questioning of a witness regarding an investigation by

the Department of Family Services (DFS). We find that Dobson's first and second claims are more appropriately addressed in this case as ineffective assistance of trial counsel. We further find that trial counsel's representation violated Dobson's Sixth Amendment rights. Accordingly, we reverse the judgment of the Superior Court and remand this matter for a new trial.

(2) In 2006, Dobson moved in with his girlfriend, C.C., and her three minor children. It is alleged that between August 2010 and August 2011, Dobson sexually molested B.C., one of C.C.'s daughters, on multiple occasions.[1] B.C. said that this activity took place "more than once" and that it occurred in various rooms of the house when her mother was not home and her siblings were not present. Specifically, B.C. said that Dobson sexually molested her twice in her bedroom, twice in the living room, twice in her mother's bedroom, and twice in the bathroom of the house. All eight incidents involved digital-penetration on the part of Dobson.

(3) Dobson was arrested in December 2011 and indicted on six counts of Rape in the Second Degree and one count of Endangering the Welfare of a Child. The six counts were worded identically, and each covered a period of one year. At a jury trial, B.C. testified without objection by Dobson's trial counsel to eight separate incidents in which Dobson allegedly sexually molested her. During

[1] The complainant and her family will be referred to by initials in accordance with Supreme Court Rule 7(d).

B.C.'s testimony, neither Dobson's trial counsel nor the trial judge were aware of which incident of sexual molestation described by B.C. corresponded with each count in the indictment. Only after the trial judge told the State to "fess up" and identify "what incident, which bedroom, which room, which living room or bathroom a particular count goes to," did the prosecutor explain the charges against Dobson.[2] The prosecutor explained that Counts 1 and 2 pertained to acts in B.C.'s bedroom, Counts 3 and 4 in the living room, Count 5 in B.C.'s mother's bedroom, and Count 6 in the bathroom. The prosecutor did not identify which specific incidents in B.C.'s mother's bedroom and the bathroom related to Counts 5 and 6 or which acts supported the Endangering the Welfare of a Child count. Trial counsel did not file a request for a bill of particulars before trial or object to the evidence of the other crimes at any point during the trial. After a two-day trial, a jury found Dobson guilty of all charges. Dobson was sentenced to 150 years of imprisonment. This appeal followed.

(4) Dobson's primary claims on appeal relate to the jury hearing evidence of other crimes committed by Dobson through B.C.'s testimony without any clarification about how each alleged incident pertained to the crimes charge. "We review a trial court's evidentiary rulings for abuse of discretion."[3] Where there is

[2] Appellant's Opening Br. Appendix at A86.
[3] *Wilson v. State*, 950 A.2d 634, 641 (Del. 2008).

no timely objection made to the evidence, the review is for plain error.[4] Under this standard, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[5] This plain error standard is "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly shows manifest injustice."[6]

(5) Although Dobson raises claims of plain error by the trial judge, the asserted plain errors before us stem from the ineffective assistance of his trial counsel. Normally, on direct appeal "this Court will not hear any claims of ineffective assistance of counsel, which were not raised below."[7] Rather, such claims are best pursued through a Rule 61 Motion for postconviction relief.[8] But where the ineffectiveness is so apparent from the record that this Court can fully consider obvious deficiencies in representation, we will address the issue on direct

[4] *Id.* (citing *Page v. State*, 934 A.2d 891, 899 (Del.2007)).
[5] *Trump v. State*, 753 A.2d 963, 971 (Del. 2000) (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).
[6] *Id.* at 970–71 (quoting *Wainwright*, 504 A.2d at 1100).
[7] *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985) (citing *Harris v. State*, 293 A.2d 291, 293 (Del. 1972)).
[8] *See* Super. Ct. Crim. R. 61.

appeal.[9] And where trial counsel's performance is plainly insufficient, we may consider claims of ineffective assistance *sua sponte* on direct appeal.[10]

(6) Ineffective assistance of counsel claims are analyzed using the test provided in *Strickland v. Washington*.[11] Under this test, the record must show that (1) counsel's representation fell below "an objective standard of reasonableness"[12] and (2) there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[13] The first prong includes "a strong presumption that defense counsel's conduct constituted sound trial strategy."[14] A reasonable probability under the prejudice prong "is a probability sufficient to undermine confidence in the outcome"[15] such that "the result of the proceeding was fundamentally unfair or unreliable."[16]

(7) On appeal, Dobson characterizes trial counsel's deficiencies as errors the trial court should have prevented *sua sponte*. But Dobson's argument that the trial judge erred when he sent Counts 5, 6, and the Endangering Count to the jury without correctly identifying which acts corresponded to which crimes is—on the

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[9] *E.g.*, *Lewis v. State*, 757 A.2d 709, 712 (Del. 2000).
[10] *Cf. Massaro v. United States*, 538 U.S. 500, 508–09 (2003) ("There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*.").
[11] *Strickland v. Washington*, 466 U.S. 668 (1984).
[12] *Id.* at 688.
[13] *Id.* at 694.
[14] *Shelton v. State*, 744 A.2d 465, 475 (Del. 2000) (citing *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990)).
[15] *Strickland*, 466 U.S. at 694.
[16] *Shelton*, 744 A.2d at 475 (quoting *Outten v. State*, 720 A.2d 547, 552 (Del. 1998)).

facts of this case—more appropriately an error on behalf of trial counsel. By failing to request a bill of particulars or otherwise becoming informed through discovery, defense counsel proceeded to trial with inadequate knowledge of the case to be tried. Trial counsel's cumulative performance and lack of performance here satisfies the first prong of the *Strickland* analysis.

(8) Counsel's errors also fulfill *Strickland*'s prejudice prong. "A bill of particulars generally confines the prosecution's proof to the particulars supplied."[17] According to the State, the original charges coordinated with the disclosures B.C. made in her interview with DFS's Children's Advocacy Center which were limited to acts in B.C.'s bedroom, in the living room, and in the mother's bedroom. Nevertheless, uncharged crimes of Rape in the Second Degree were presented to the jury without any limiting instruction explaining the purpose of doing so. Moreover, the State has conceded that a specific unanimity instruction should have been given as to Count 6 in this case. We conclude from the record of ineffective assistance before us that prejudice has been shown and confidence in the outcome of this proceeding has been sufficiently undermined to require a new trial.

[17] *Lovett v. State*, 516 A.2d 455, 466 (Del. 1986) (citing *United States v. Glaze*, 313 F.2d 757, 759 (2d Cir. 1963)).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **REVERSED** and this matter is **REMANDED** for a new trial.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice