STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: October 8, 2019]

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. PM-2017-0209**
	:	
NOAH L. COOK	:	

DECISION

MCGUIRL, J. Before this Court is the Motion of Noah L. Cook (Mr. Cook or Petitioner) for Post Conviction Relief. Mr. Cook files his motion on the basis that he received ineffective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-1(a).

I

Facts and Travel

Mr. Cook faced four charges contained in the criminal complaint P2/2013-3152ADV: Domestic Strangulation G.L. 1956 § 11-5-2.3 (June 23, 2013); Felony Domestic Assault § 11-5-2 (July 7, 2013); Simple Domestic Assault § 11-5-3/G.L. 1956 § 12-29-5 (July 7, 2013); and Simple Domestic Assault § 11-5-2.3 (June 23, 2013) of Ms. Tara Sunderland (Ms. Sunderland). These charges relate to incidents that took place on June 23, 2013 and July 7, 2013 respectively. Mr. Cook faced trial on March 10, 2015 through March 17, 2015. During trial testimony was provided by Ms. Sunderland, Dr. Victor Pinkes (Dr. Pinkes), Officer Kathleen Kelly (Officer Kelly), Mr. Cook, and Michael Toscani (Mr. Toscani), an acquaintance of both parties. Specifically, Ms. Sunderland and Mr. Cook testified to their accounts of the alleged assaults on the respective dates with Mr. Cook indicating rough sex caused Ms. Sunderland's injuries on June 23, 2013 while also

providing an alternative recounting of events relating to the July 7, 2013 encounter. Conversely, Ms. Sunderland indicated that she was assaulted on both dates and suffered serious injuries as a result. Dr. Pinkes offered testimony regarding Ms. Sunderland's injuries and demeanor when he treated her after the alleged assault. Officer Kelly of the Burrillville Police Department testified to Ms. Sunderland's appearance and demeanor when Ms. Sunderland presented to the Burrillville Police Station July 7, 2013, seeking to file a police report. Finally, Mr. Toscani testified that he was familiar with both parties and recounted a brief conversation he had had with Ms. Sunderland after the incidents in which she indicated she was taking Mr. Cook to court. Ultimately, Mr. Cook was convicted of the charges stemming from the July 7, 2013 incident, but was acquitted of the June 23, 2013 charges.

On January 12, 2017, Mr. Cook filed this Application for postconviction relief. Mr. Cook alleges that he received ineffective assistance of counsel from both of his attorneys of record in the criminal case—Attorney David Levy (Mr. Levy) and Attorney F. Joseph Patriarca (Mr. Patriarca). The heart of his claim against his attorneys' actions results from a confidential statement (the statement) that Mr. Cook prepared, at the request of Mr. Patriarca, describing his version of the events involving Ms. Sunderland and himself. Mr. Patriarca gave the State a copy of the statement—allegedly at the behest of Mr. Cook—which was later used against Mr. Cook on cross-examination during trial when represented by his trial attorney, Mr. Levy. Mr. Cook claims he did not know or agree to give the statement to the prosecutor and was surprised by its use at trial. He claims that the statement impacted his trial because the statement and his testimony on direct examination were inconsistent with one another. Mr. Cook claims that he was convicted of the charges stemming from the July 7, 2013 incident because of the inconsistencies but was

acquitted of the June 23, 2013 charges because his testimony was consistent with the written statement.

This Court held evidentiary hearings in connection with Mr. Cook's motion in November 2017, and February and June of 2018. During these hearings, the Court heard testimony from Mr. Patriarca, Mr. Levy, Mr. Cook, and State prosecutor Daniel Guglielmo (Mr. Guglielmo). During these hearings, particular emphasis was placed on the contents, purpose, use, and transmittal of the statement written by Mr. Cook. The statement describes the events of June 23, 2013 and July 7, 2013 from Mr. Cook's perspective. Mr. Cook described the June 23, 2013 incident and the injuries suffered by Ms. Sunderland on that date as arising from rough sex and that Ms. Sunderland requested he "asphyxiate her in attempt [*sic*] so she may gain an orgasm, so we had sex with the dog collar around her neck." (Ex. C at 1.) The statement also offers Mr. Cook's alternative recollection of events relating to the July 7, 2013 incident in which he describes an argument over his cell phone and other women precipitated a physical altercation.

After review of submitted evidence and testimony, a Decision is herein rendered.

II

Standard of Review

"'[T]he remedy of postconviction relief is available to any person who has been convicted of a crime and who thereafter alleges either that the conviction violated the applicant's constitutional rights or that the existence of newly discovered material facts requires vacation of the conviction in the interest of justice.'" *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011) (quoting *Page v. State*, 995 A.2d 934, 942 (R.I. 2010)) (further citation omitted); *see also* § 10-9.1-1. Postconviction relief applications are civil in nature and thus, are governed by all applicable rules and statutes governing civil cases. *Ferrell v. A.T. Wall*, 889 A.2d 177, 184 (R.I. 2005). Thus, "[a]n

applicant for such relief bears '[t]he burden of proving, by a preponderance of the evidence, that such relief is warranted' in his or her case." *Brown v. State*, 32 A.3d 901, 907 (R.I. 2011) (citing *State v. Laurence*, 18 A.3d 512, 521 (R.I. 2011)).

III

Analysis

Mr. Cook claims that he is entitled to postconviction relief because he was denied the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution. He alleges that both attorneys who represented him in his criminal matter were ineffective.

The analytical framework for an ineffective assistance claim is well-established. To prevail on an application for postconviction relief based on ineffective assistance of counsel, a petitioner must establish two criteria. *Rodriguez v. State*, 941 A.2d 158, 162 (R.I. 2008). He must first demonstrate that "counsel's performance was deficient in that it fell below an objective standard of reasonableness." *Hazard v. State*, 64 A.3d 749, 756 (R.I. 2013) (citation omitted). Second, he must demonstrate that the deficient performance prejudiced the defense meaning "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Court affords a "high degree of deference" to trial counsel when evaluating a claim for ineffective assistance of counsel. *Hazard*, 64 A.3d at 762.

A

Alleged Ineffective Assistance of Attorney Joseph Patriarca

1

Failure to Attend Trial

Mr. Cook claims that he is entitled to postconviction relief because Mr. Patriarca was not present for his criminal trial even though he was the attorney of record. He further alleges that Mr. Patriarca never withdrew from his case.

Generally, counsel cannot terminate the representation of a client without taking affirmative action. *In re Gordon*, 780 F.3d 156, 159 (2nd Cir. 2015) (affirming the discipline of an attorney-of-record who failed to appear in appellate proceedings but who had never formally withdrawn from the case). The attorney must wait until the court grants leave to withdraw. An attorney who has failed to withdraw is still considered responsible for the case. 7 Am. Jur. 2d *Attorneys at Law* § 174 (2017) ("An attorney who has appeared as an attorney of record cannot terminate the attorney-client relationship by withdrawal until application is made to the court and leave to withdraw is granted; until such occurs, the attorney-client relationship continues until the end of litigation.") However, the entry of appearance of another attorney may excuse the need for a formal substitution. 7 Am. Jur. 2d *Attorneys at Law* § 177 (2017) ("[A]lthough generally the attorney of record has the exclusive right to appear for his or her client, when the actual authority of the new or different attorney appears, the absence of record of a formal substitution may be excused.").

It is undisputed that Mr. Patriarca was Mr. Cook's attorney of record. It is also undisputed that Mr. Patriarca failed to formally withdraw from the case. He neither filed a motion nor was he granted leave to withdraw. However, Mr. Patriarca ensured that Mr. Cook had substitute counsel.

7 Am. Jur. 2d *Attorneys at Law* § 177 (2017). Mr. Patriarca claims that he brought Mr. Levy into the case, as trial counsel, when he believed the case could not be resolved through plea negotiations. He gave Mr. Levy the complete file that he had prepared for Mr. Cook's case. Likewise, Mr. Guglielmo testified that his notes from the time indicate that "Mr. Levy enters on 9/29/[2014]" and that his "assumption was that Mr. Levy was coming in and Mr. Patriarca was out. I had no more dealings with [Mr. Patriarca]." (Post Conviction Relief (PCR) Hr'g Tr. 12:8-16, Nov. 2, 2017.)

Mr. Levy testified that he believes Mr. Patriarca was present during jury selection for Mr. Cook's trial. (PCR Hr'g Tr. 25:25, June 20, 2018.) According to Mr. Levy, Mr. Patriarca was Mr. Cook's friend. *Id*. at 26:3-4. Mr. Levy further indicated that Mr. Patriarca neither sat at the counsel table nor did he assist with jury selection. *Id*. at 26:5-8. Moreover, Mr. Levy testified that Mr. Patriarca was not working with him on the case and had no role in trying the case. *Id*. at 26:18-22. In addition, Mr. Levy noted that he is unsure whether Mr. Patriarca formally withdrew from the case. *Id*. at 26:10-11. When Mr. Levy was asked whether he expected Mr. Patriarca at trial, he indicated that "He [Mr. Patriarca] said at one point he wanted to be there." *Id*. at 26:16-17. Mr. Levy's testimony indicates that he intended and did take over as Mr. Cook's trial counsel after the failed negotiations.

In spite of Mr. Patriarca's failure to take formal action, it is unlikely that Mr. Cook suffered any prejudice from the failure of Mr. Patriarca to appear at trial. Mr. Cook claims that he was prejudiced by Mr. Patriarca's absence, but his argument fails to account for the discussion he had with the Court on the record. Specifically, he told the Court that he had no concerns or problems with Mr. Patriarca's absence:

> "THE COURT: All right. A couple of things I just want to put on the record before we go any further. Mr. Cook, according to the

> court file, Mr. Patriarca -- I think Francis Joseph Patriarca was representing you at one point. He hasn't withdrawn. My understanding was some conference was going on, after which time had passed, I was informed that Mr. Levy was entering the case to try the case. Is that correct?
>
> "THE DEFENDANT: That is correct. Yes, Your Honor.
>
> "THE COURT: And Mr. Patriarca has not been here and I don't expect him to be here for the trial. Do you have any problem with that?
>
> "THE DEFENDANT: Not at all, Your Honor.
>
> "THE COURT: So Mr. Levy is your trial counsel?
>
> "THE DEFENDANT: Yes." (Trial Tr. 6:4-18, Mar. 13, 2015.)

Mr. Cook's assent above seemingly ratifies Mr. Patriarca's absence. *State v. Moran,* 699 A.2d 20, 25 (R.I. 1997) ("We have recognized that an accused's right to select his or her own attorney to defend against criminal charges has a central role in our adversary system of justice . . . Although a criminal defendant's right to the attorney of his or her choice is not absolute, it does command a presumption in favor of its being honored."). Further, Mr. Patriarca believed that Mr. Cook "needed someone with more trial experience than [him]self." (PCR Hr'g Tr. 43:11-12, Nov. 2, 2017.) As a result, he "had given Mr. Cook three options with three different attorneys" and Mr. Cook agreed to representation by Mr. Levy after an introductory meeting arranged and attended by Mr. Patriarca. *Id.* at 33:3-14. Accordingly, because there was substitute counsel and Mr. Cook assented to said substitution in open Court, the substitution was neither unreasonable nor prejudicial.

2

Disclosing the Confidential Statement

Second and most importantly, Mr. Cook claims that Mr. Patriarca was ineffective when he gave his written statement to the State without his informed consent or knowledge that such was provided. Mr. Cook asserts that he did not give permission for Mr. Patriarca to provide the State with a copy of his written statement. He further adds that Mr. Patriarca failed to inform Mr. Levy that the statement existed and that it had been previously given to the State. Mr. Cook further asserts that he was unprepared for the statement's use during his cross-examination at trial. Accordingly, Mr. Cook now also contends that the unauthorized transmittal of his statement to Mr. Guglielmo violated the attorney client privilege outlined in Article V, Rule 1.6(a) of the Rules of Professional Conduct.

During the evidentiary hearings, Mr. Patriarca explained that it was his typical business practice to have his clients compile a document recounting their version of events relating to their representation. He further testified that he "absolutely do[es] remember" telling Mr. Cook of his policy not to disclose the personal statements and "was very adamant about that." PCR Hr'g Tr. 26:18; 26:22, Nov. 2, 2017. Mr. Patriarca was questioned about whether he actually gave a copy of the statement to the State, to which he replied "[a]t Mr. Cook's request, yes" and that "[Mr. Cook] told me he wanted Mr. Guglielmo to have a copy of the time - - what he called the time line." *Id*. at 29:18; 29:21-22. Mr. Patriarca further explained that he did not want to turn over the statement but Mr. Cook insisted, despite repeated advice that it was not in Mr. Cook's best interest. In addition, Mr. Patriarca indicated that Mr. Cook was present and "behind my right shoulder and Mr. Guglielmo was standing . . . to the left of me" when Mr. Patriarca handed over the statement to the State on the third floor of the courthouse. *Id*. at 31:5-8. Mr. Patriarca indicates that Mr. Cook

was present when he handed over the statement to the State prior to trial and thus was aware of the State's possession of the statement.

Mr. Cook states that he had no knowledge of the State having his written statement. He claims that he was shocked when Mr. Guglielmo presented the statement to him on cross-examination. Of particular interest, Mr. Guglielmo testified that it was the State's understanding that "[the statement] was [Petitioner's] version of events" and that [Petitioner] wanted to explain himself and wanted to, obviously, throw the victim's credibility into question as well." *Id*. at 14:19-24.

Mr. Levy testified that he was told Mr. Cook told Mr. Patriarca to give the statement to the State so they would know what happened and to contradict Ms. Sunderland's account of the events. In corroboration of Mr. Patriarca's testimony, Mr. Levy testified that he ran into Mr. Patriarca in the court house and at times discussed the statement with him. (PCR Hr'g Tr. 9:8-11, June 20, 2018.) Mr. Levy further testified, "[Mr. Patriarca] told me Mr. Cook wanted him or instructed him to turn it over to Mr. Guglielmo so Mr. Guglielmo would have Mr. Cook's version of events." *Id*. at 8:4-6. Mr. Levy adds that Mr. Patriarca told him that he should not have given the document over to Mr. Guglielmo but that Mr. Cook insisted upon it. *Id*. at 9:15-17.

The testimony of both Mr. Levy and Mr. Patriarca indicates that Mr. Cook wanted the State to have his written statement to further its purpose to discredit the victim. Similarly, Mr. Patriarca testified that he gave a copy of the statement to Mr. Guglielmo "[a]t Mr. Cook's request . . ." and that "[Mr. Cook] told me he wanted Mr. Guglielmo to have a copy of the time- - what he called the time line . . . to prove that the victim in the case was lying as far as the timing of the incident that had occurred." PCR Hr'g Tr. 29:18-25, Nov. 2, 2017.

Moreover, it is the Court's belief that Mr. Cook desired and requested the statement be provided in an effort to refute the damaging testimony which was provided by Ms. Sunderland. The Court acknowledges Mr. Cook's affidavit and testimony attesting to his lack of consent or knowledge that the statement was transferred to the State but remains satisfied that the testimony and representations of long-tenured attorneys—both representing Mr. Cook and the State—represents credible evidence that the statement was transferred at the request of Mr. Cook. *See Fontaine v. State*, 602 A.2d 521, 525-26 (R.I. 1992) ("Because the trial justice was presented with conflicting testimony and evidence, he was able to make sound credibility findings by assessing the facts and the totality of the circumstances before him."). The Court does not accept Mr. Cook's delayed and self-serving contention that he did not consent. Likewise, the Court is unpersuaded by Mr. Cook's contention that he did not authorize Mr. Patriarca to turn the statement over to the State. There was no reason for Mr. Patriarca to give it to the State—Mr. Patriarca had never done so before. Accordingly, this Court accepts the testimony of Mr. Patriarca and finds that Mr. Cook directed and subsequently knew that the State had his written statement. *See State v. Feng*, 421 A.2d 1258, 1273 (R.I. 1980) (noting that in review of a PCR application, our Supreme Court is bound by the trial justice's determination regarding credibility).

3

Confidentiality Issue

In Rhode Island, lawyers are required to protect the client's confidentiality by not revealing client information unless he or she gives informed consent. *See* Article V, Rule 1.6(a) of the Rules of Professional Conduct. Absent informed consent, the lawyer may only disclose client information to the extent that the disclosure is "impliedly authorized in order to carry out the

representation." *Id.* At issue is whether Mr. Cook gave Mr. Patriarca consent to hand over his written statement to the State. Mr. Patriarca says yes, Mr. Cook says no.

Mr. Patriarca's actions fail to rise to the level of objectively unreasonable representation as the weight of the evidence indicates Mr. Cook consented and instructed Mr. Patriarca to turn over the statement in an effort to advance alternative narratives and rebut adverse testimony of Ms. Sunderland. *See Bobby v. Van Hook*, 558 U.S. 4, 9 (2009) (finding "[r]estatements of professional standards . . . can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." (quoting *Strickland*, 466 U.S. at 688)).

It is well-settled that violations of professional standards do not automatically warrant a finding that an attorney's performance is deficient. *Bobby*, 558 U.S. at 9 ("'[W]e have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'") (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)). Further, in a petition for postconviction relief, a petitioner is only entitled to postconviction relief if he or she can prove that the conviction is contrary to the state or federal constitution. *Barros v. State*, 180 A.3d 823, 828 (R.I. 2018). There is no constitutionally protected right to confidentiality. *See Maness v. Meyers,* 419 U.S. 449, 466 n.15 (1975) ("We are not aware that the Court has ever identified a 'constitutionally protected attorney-client' privilege of the scope postulated by Mr. Justice Stewart [in his concurrence]." *see also Clutchette v. Rushen,* 770 F.2d 1469, 1471 (9th Cir. 1985) ("Standing alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right."). Thus, it is unclear even whether an alleged unauthorized disclosure—if disclosing prior to trial at a client's behest can be considered an unauthorized disclosure—is a basis for finding an attorney to have deficient performance consistent with

denying a defendant a fair trial. *Strickland*, 466 U.S. at 687. Having said that, if the trial court found the statement written by Mr. Cook was given to the State without his permission or agreement, the analysis would have been different.

B

Alleged Ineffective Assistance of Attorney Levy

1

Failure to Prepare Mr. Cook for Trial and Cross-Examination

Mr. Cook claims that Mr. Levy did not prepare him for trial. According to Mr. Cook, he was surprised and unprepared for the questioning about his written statement on cross-examination.

a

First Prong: Deficient Performance

Courts have found deficient performance when an attorney spends very little time with the defendant prior to trial, given the seriousness of the charge and the circumstances of the case. *See United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983) ("Adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant."). The amount of consultation will differ depending on the case, but it should be "sufficient to determine all legally relevant information known to the defendant." *Id.* at 582.

In *Turner v. Duncan*, the attorney for a man accused of first degree murder spent "at most forty-five minutes" with Turner before trial. *Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998). In finding deficient performance, the Court noted: "[the attorney's] cursory consultation is especially shocking in light of the seriousness of the charges against Turner, the fact that the entire

defense hinged on Turner's intent and mental state, and that Turner testified in a manner that suggests he was wholly unprepared to answer questions on cross-examination." *Id.* at 457.

As in *Turner*, Mr. Cook faced serious charges: felony domestic assault, strangulation, and two counts of simple domestic assault. 158 F.3d at 457 (referring to charges as "serious" when the defendant allegedly killed the victim by pouring gasoline onto him and setting him on fire). For the strangulation offense, Mr. Cook faced a sentence of up to ten years in prison. *See* Sec. 11-5-2.3(a). The simple assault charge carries a possible sentence of up to one year imprisonment and/or a fine of one thousand ($1000) dollars. Sec. 11-5-3(a). Felony assault warrants a sentence of up to six years imprisonment unless the assault resulted in "serious bodily injury," in which case, the sentence is up to twenty years imprisonment. Sec. 11-5-2(a). While Mr. Cook's charges do not rise to the same level of criminality (*i.e.*, not murder), the Rhode Island legislature has recognized the seriousness of domestic assault and strangulation by assigning lengthy penalties. Therefore, since the charges were serious, it was imperative that Mr. Levy conversed with Mr. Cook about his charges and prepared him to assist in his defense. *Tucker*, 716 F. 2d at 582.

Mr. Cook claims that he was neither prepared for trial nor was he prepared for cross-examination. Mr. Cook and Mr. Levy both testified to the amount of preparation and consultation that occurred prior to Mr. Cook's criminal trial. Mr. Cook indicates that he did not review the text messages between Ms. Sunderland and himself prior to trial. In contrast, Mr. Levy described the amount of time he spent preparing Mr. Cook with the following: "[w]ell, on numerous occasions we talked about the two different assault allegations and what had happened, because they were approximately a week apart from what I remember. And he, meaning Noah, explained to me the circumstances surrounding each one of the incidents. There were four counts in all; two counts relating to each assault." (PCR Hr'g Tr. 11:13-19, June 20, 2018.)

While vague, Mr. Levy informed the Court that he met with Mr. Cook more than once. This preparation is unlike that of *Turner*, where the defense attorney spent no more than a total of forty-five minutes speaking to the defendant. *Turner,* 158 F.3d at 457. Mr. Cook also acknowledges that he and Mr. Levy conferred enough to decide that he would not take the stand in his own defense. Moreover, Mr. Cook provided that he and Mr. Levy again spent time, albeit thirty minutes, talking before the presentation of the defense case in chief, before deciding that Mr. Cook now needed to take the stand in his defense.

Also, unlike *Turner*, the defense did not hinge on the mental state and intent of the defendant. *Turner*, 158 F.3d at 457. Instead, the defense presented testimony about Mr. Cook's version of the events compared with the victim's version. Mr. Levy did not need to spend several hours reviewing Mr. Cook's testimony because he already had reviewed his reason via the statement. Mr. Levy had most, if not all, of the "legally relevant information known to the defendant," because Mr. Cook's written statement detailed facts and information about the victim in addition to Mr. Cook's view of the June and July incidents. *Tucker*, 716 F.2d at 582. Thus, it is unlikely that Mr. Levy can be considered deficient for failing to generally prepare Mr. Cook for trial.

Mr. Cook also asserts that Mr. Levy failed to prepare him for cross-examination. While Mr. Levy cannot be considered deficient for the level of general trial preparation, he appeared to have failed to prepare Mr. Cook for cross-examination. Specifically, the use of Mr. Cook's written statement on cross-examination, which Mr. Levy confirms he had knowledge of. Mr. Cook explained that he was neither aware nor prepared for the prosecution's use of the statement on cross-examination. Mr. Cook reports that he was surprised that the State had the document and questioned him about the contents. Also, according to Mr. Cook, he was unprepared to answer

questions about his written statement on cross-examination. The credibility of Mr. Cook's assertions regarding State possession of the statement is discussed *supra*.

Mr. Levy explained in his view how Mr. Cook's written statement fit into the pre-trial preparation. First, Mr. Levy stated that he had personally reviewed the statement. (PCR Hr'g Tr. 9:22, June 20, 2018.) When asked whether Mr. Levy reviewed the written statement with Mr. Cook, he replied in the negative. *Id*. at 12:4-5. However, even though Mr. Levy acknowledged that it would have been important to go over the statement with Mr. Cook, he indicated that he is unsure whether he ever reviewed Mr. Cook's statement with him. *Id*. at 21:1; 9:20. Instead, Mr. Levy "assumed [Mr. Cook] was well aware [of his prior statement], it was his statement." *Id*. at 11:23-24. Despite this knowledge, Mr. Levy indicated that Mr. Cook may have expressed surprise at the prosecution's use of the statement in cross-examination. *Id*. at 13:20-22.

Despite the differences in their version of events, both Mr. Cook and Mr. Levy acknowledge that Mr. Cook experienced some level of surprise on cross-examination. Mr. Cook's unpreparedness for cross-examination is significant in evaluating the effectiveness of Mr. Levy's counsel. *See Turner*, 158 F.3d at 457 (finding the defendant being "wholly unprepared to answer questions on cross-examination" as one reason of many to find deficient counsel performance.) In fact, Mr. Levy states that it would have been important to review Mr. Cook's statement with him prior to trial. (PCR Hr'g Tr. 21:1, June 20, 2018.) Therefore, Mr. Levy's misplaced belief that Mr. Cook, as author of the statement, would be aware of its contents was not malicious or outrageous but nonetheless evidences a failure to adequately prepare Mr. Cook to face the serious domestic assault charges. Accordingly, this misstep satisfies the first prong of the test for ineffective assistance of counsel, deficient performance.

b

Second Prong: Prejudice

Mr. Cook claims that he was prejudiced by the statement because at times he testified inconsistently with his written statement. He asserts that he was convicted of the charges for which his testimony differed from his written statement.

A court will hesitate to find prejudice for failing to prepare a client for cross-examination when either of the following apply: (1) the case against the defendant is strong; or (2) the inconsistencies "do not go to any element of the charges against him"; or (3) the inconsistencies do not go "to his account of the events related to [the incident]." *Wilson v. Henry*, 185 F.3d 986, 991 (9th Cir. 1999).

In *Wilson*, a defendant argues that his attorney was ineffective because he did not properly prepare him for cross-examination. *Id.* at 991. According to the defendant, his attorney met with him for an hour before trial and spoke to him for fifteen minutes each day of trial. *Id* at 987-988. Ultimately, the Court held that this rationale could not support a claim for ineffective assistance of counsel because the defendant was not prejudiced by the inconsistencies in his testimony on cross-examination to trigger an unfair trial. *Id.* at 991. In so holding, the court referred to the aforementioned factors finding that the defendant's arguments lacked any of the three elements. *See, e.g., Renner v. United States*, unpublished opinion in 49 F. App'x 628, 632 (7th Cir. 2002) (finding no *reasonable probability* that but for counsel's failure to prepare the witnesses for trial that the outcome of the trial would have been different as opposed to a *mere chance* that the outcome would have been different) (emphasis added).

C

Significance of the Statement to the Cross-Examination

Mr. Cook argues he was prejudiced because the testimony differed from the written statement. Mr. Guglielmo used the statement in three lines of questioning of Mr. Cook: whether Ms. Sunderland tackled or fell onto Mr. Cook on July 7, 2013; establishing the significance of Mr. Cook's cell phone to the July 7, 2013 incident; and determining which party ended the relationship. The following provides a discussion of the perceived discrepancies in Ms. Sunderland's testimony, Mr. Cook's testimony and his statement, as well as the statement's subsequent use on cross-examination.

1

June 23, 2013 Incident

Ms. Sunderland testified that the pair began arguing at Gonyea's Tavern over a tear in Ms. Sunderland's pants. After leaving Gonyea's and returning to Mr. Cook's home, Ms. Sunderland explained the argument escalated, and Mr. Cook allegedly pushed Ms. Sunderland into the cupboard and flung her to the ground. Subsequently, Ms. Sunderland testified that she attempted to get up from the floor but Mr. Cook "pretty much straddled me with his legs, and he had both hands on my neck and pushed me into the floor, stopped me from breathing." (Trial Tr. 54:6-8, Mar. 11, 2015.) This alleged choking continued for "at least a good minute or two" and left Ms. Sunderland feeling "dizzy, [and] blurry." *Id*. at 57:22-23; 58:9. Ms. Sunderland further testified to the text messages she exchanged with Mr. Cook the following morning regarding the previous night's events and injuries suffered by Ms. Sunderland. These messages relate to the burst blood vessel in Ms. Sunderland's eyes and her visit to the Hospital on June 24, 2013 for treatment.

In his statement, Mr. Cook focuses on the alleged assault. He states that Ms. Sunderland was drunk and that she likes rough sex. He also stated, "[w]e were in the act of having sex and she

wanted me to asphyxiate her in attempt [sic] so she may gain an orgasm, so we had sex with the dog collar around her neck." (Ex. C at 1). His statement provides that to his knowledge she neither passed out nor stopped breathing. *Id*. It also states that Ms. Sunderland told him that she could not have orgasm unless she was asphyxiated or choked. *Id*. He indicated that he purchased a dog collar after learning about Ms. Sunderland's sexual preferences. *Id*.

According to Mr. Cook's statement, Ms. Sunderland awoke the next morning upset that she had burst blood vessels in her eyes and the way they looked. *Id*. He wrote in the statement that Ms. Sunderland went to the hospital and wanted to discuss the $200 bill that she was charged. *Id*. In the statement, Mr. Cook replied that he no longer wanted to participate in what he called "rough sex" and gave Ms. Sunderland approximately $240 cash in the amount of the hospital bill. *Id*.

At trial, Mr. Cook testified regarding their conversations on the following day. He testified that he and Ms. Sunderland exchanged text messages. He indicated that he apologized via text to Ms. Sunderland because he knew she was upset and because he was concerned about her statement that he hurt her. (Trial Tr. 449:7-23, Mar. 13, 2015.) He testified that he spoke with Ms. Sunderland in person at his home on June 24, 2013. *Id*. at 450:3. He stated that he noticed her eye during their conversation. *Id*. at 451:7. He indicated that they discussed her visit to the hospital. *Id*. at 451:14-15. According to Mr. Cook, Ms. Sunderland told him that she had to get her eye checked out because her eye was red and she found out that she broke a blood vessel. *Id*. at 451: 18-19. Mr. Cook also stated that Ms. Sunderland believed the injury to her eye occurred during sex. *Id*. at 452:5. In the relevant matters, the statement and Mr. Cook's testimony are extremely similar and were thus not touched upon by the prosecution during cross-examination.

2

July 7, 2013 Incident

Ms. Sunderland testified that on July 6th, she and Mr. Cook had spent the day at Foxwoods Casino and stopped at Gonyea's Tavern on their way home to see friends. Trial Tr. 92:4-8, Mar. 11, 2015. The pair returned to Mr. Cook's home at approximately 1 a.m. on July 7. *Id.* at 93:19-20. Upon arrival, Ms. Sunderland explained that she and Mr. Cook were embraced face to face in an amicable nature when she slipped and the two fell to the ground with Mr. Cook hitting his face on the corner of a wall and Ms. Sunderland hitting her head. *Id.* at 95:4-25. As a result, Mr. Cook suffered a cut near his eye and yelled at Ms. Sunderland that she had fallen on purpose. Ms. Sunderland then testified that Mr. Cook "pushed me on the floor and stomped on me with his boots" while she was in the bathroom preparing to take a shower. Trial Tr. 99:22-23, Mar. 11, 2015. Ms. Sunderland testified she tried to make Mr. Cook understand it was an accident but he then allegedly punched her in the right side of her face with such force she believed her nose was broken. Subsequently, Ms. Sunderland called a friend and sought treatment at a nearby clinic.

In his statement, Mr. Cook first discusses his day out with Ms. Sunderland. He states that they went on a motorcycle ride and eventually went to Gonyea's Tavern. (Ex. C at 1). He wrote that they left around 12:00 [a.m.]. Sometime after arriving at his home, Ms. Sunderland and Mr. Cook argued about his cell phone and other woman. *Id*. Mr. Cook's statement indicates that Ms. Sunderland grabbed his cell phone and jumped onto his back—after Mr. Cook took the phone back—causing him to fall to the ground. *Id*. Subsequently, Mr. Cook alleged this action caused him to hit his head on the wall on the way down to the floor and that Ms. Sunderland was on top of him. Mr. Cook wrote that he held his bleeding head while on the floor. *Id*.

The statement further indicates that following the tackle, Ms. Sunderland went to the bathroom to take a shower. Mr. Cook went into the bathroom to check on Ms. Sunderland and see

what she was doing. As he entered the bathroom, Ms. Sunderland was in the process of getting undressed and Mr. Cook claims he did not see any bruises or cuts on her body. He added that he did not touch her and that there was nothing wrong with her "other than being staggering drunk." *Id.* He wrote that he and Ms. Sunderland argued—including Mr. Cook telling Ms. Sunderland to "shut her fucking mouth"—and that he eventually told her to get her things and leave. *Id.* According to him, Ms. Sunderland did not leave at that point. Mr. Cook left the bathroom to get another paper towel for his cut. He repeatedly told Ms. Sunderland to retrieve her belongings and leave his home. He entered the bathroom and turned off the water for the shower and again told Ms. Sunderland to leave. After he left the bathroom, Ms. Sunderland stayed a few minutes in the bathroom and then left his home with her dog.

There are some differences between Mr. Cook's testimony and the written statement. First, in the statement, Mr. Cook claims that Ms. Sunderland had his phone but that he took it back from her. He then stated that she jumped on his back and tackled him to the ground. He claims that this action caused him to fall and hit his head on the wall. This statement contrasts with his testimony. On direct examination, he testified that Ms. Sunderland had the cell phone in her right hand and lifted her arm up. He added that this action caused her to fall towards him and that her fall knocked him over.

Additionally, there is a difference regarding the argument in the bathroom. Mr. Cook writes in his statement that Ms. Sunderland was getting undressed to get in the shower when he entered the bathroom. He writes that he was able to see that she had no bruises or markings on her body. This differs from his testimony during which he indicates that she had clothing on, stood near the vanity, and held his phone.

Further, the testimony regarding the possession of the cell phone is different. In his statement, Mr. Cook writes that he already had the cell phone back from Ms. Sunderland prior to her entering the bathroom. In his testimony, Mr. Cook states that Ms. Sunderland had the cell phone in the bathroom and was going through it. Moreover, the statement provides that he did not touch Ms. Sunderland. In contrast, it is Mr. Cook's testimony that he grabbed Ms. Sunderland's arm and removed the cell phone from her hands while she was in the bathroom.

Lastly, the conversation after the incident differs in the two statements. In the written statement, Ms. Sunderland tells Mr. Cook that she would not "get [him] in trouble" because he is not at fault. *Id*. at 2. She also tells him that she "would handle it." *Id*. The written statement also provides that Ms. Sunderland assured Mr. Cook that "things would be fine" and that Mr. Cook "shouldn't have a problem" if he paid her hospital bill. *Id*. The written statement differs from Mr. Cook's testimony because Ms. Sunderland said that it was her decision whether to go to the police but did not claim that Mr. Cook was not at fault, nor did she indicate that she would "take care of it."

D

State's Use of the Statement on Cross-Examination

During cross-examination, Mr. Guglielmo asked questions about the perceived discrepancy between Mr. Cook's testimony and his statement relating to the July 7 incident. In Mr. Cook's statement, he claims that Ms. Sunderland jumped on his back and tackled him. (Trial Tr., 552:14-15, Mar. 13, 2015.) This statement differs from Mr. Cook's testimony on direct examination. During direct examination, he stated "[Ms. Sunderland] fell and knocked me over." *Id*. at 476:5. To explain this discrepancy, Mr. Cook stated that "[he] explained [the incident in the statement] the way it happened from [his] best recollection from that day." *Id*. at 553:7-8.

Mr. Guglielmo also used the statement to question Mr. Cook on the role his cell phone played in the July 7, 2013 incident. In Mr. Cook's statement, he wrote that Ms. Sunderland grabbed his cell phone even though "[he] told her not to touch it" and that he "took it away from her and turned towards [his] sink." (Ex. C at 1.) During his testimony, Mr. Cook explained "That is not what I said. That is what my secretary typed." (Trial Tr., 556:12-13, Mar. 13, 2015.)

The statement was also used to determine whether Mr. Cook or Ms. Sunderland ended the relationship. Mr. Cook's statement reads, [S]he "said we can't hang anymore because her dad is pissed off and I agreed." (Ex. C at 2.) On direct, Mr. Cook testified that he ended the relationship with Ms. Sunderland. (Trial Tr., 507:18, Mar. 13, 2015.) When asked whether the statement showed that Ms. Sunderland broke up with Mr. Cook, Mr. Cook responded "No. I would say - - use the word 'we' broke it off, and that I think fits it. I agreed with her." *Id.* at 568:19-20. Noticeably, the particularity of the statement and its corresponding degree of significance vacillate between the two incidents. Accordingly, the prosecution examined these discrepancies on cross-examination, and the alleged resultant prejudice is the basis for Mr. Cook's current application.

1

Prejudice Resulting from the Cross-Examination

As in *Wilson*, it is unlikely that Mr. Cook's statement had any prejudicial effect. *Wilson*, 185 F. 3d at 991. First, the case against Mr. Cook was otherwise strong. The jury convicted Mr. Cook of Felony Domestic Assault pursuant to § 11-5-2 and of Simple Domestic Assault pursuant to § 11-5-3/§ 12-29-5 in connection with the incident on July 7, 2013. Ms. Sunderland testified to her perspective on the July 7, 2013 incident and described Mr. Cook's attack on her. Additionally, an emergency room doctor testified to Ms. Sunderland's medical condition after the July 7, 2013 incident. Notably, he indicated that Ms. Sunderland had an uncommon nasal fracture as confirmed by an x-ray. (Trial Tr. 361:1, 19, Mar. 12, 2015.) He also testified that Ms. Sunderland broke the

anterior nasal spine meaning the upper part of the jaw and the lower part of the nose (Trial Tr. 362:1-4, Mar. 12, 2015), which is not an easily broken bone. *Id*. at 362:16. Further, medical records introduced at trial indicated that Ms. Sunderland's chief complaint was that she was "punched in the nose by her boyfriend." *Id*. at 358:3-14. Moreover, photographs taken by the Burrillville police were introduced into evidence and illustrated significant redness and bruising on Ms. Sunderland's left eye, right shoulder, lower lip, and upper arm.

In addition, the State introduced a three-minute long voicemail recording of "everything that happened in the bathroom" on the evening of July 6, 2013/early morning hours of July 7, 2013. *Id*. at 337:22-23. Accordingly, the jury had ample evidence against Mr. Cook when considering whether to convict him of the charges stemming from July 7, 2013. Thus, Mr. Cook's perceived inconsistencies regarding his testimony of the July 7, 2013 incident are of no consequence because there was additional, strong evidence of his guilt. *Wilson*, 185 F.3d at 991.

Next, the inconsistencies do not go to an element of the charges against him. *Id.* Felony assault requires an assault or battery on a person with a dangerous weapon. Sec. 11-5-2(a). Simple assault requires an assault or battery on a person. Sec. 11-5-3/§ 12-29-5. Assault is "'a physical act of a threatening nature or an offer of corporal injury which puts an individual in reasonable fear of imminent bodily harm,' and the apprehension of injury renders the defendant's act compensable." *Broadley v. State*, 939 A.2d 1016, 1021 (R.I. 2008) (quoting *Hennessey v. Pyne,* 694 A.2d 691, 696 (R.I. 1997)). On the other hand, battery is "'an act that was intended to cause, and does cause, 'an offensive contact with or unconsented touching of or trauma upon the body of another, thereby generally resulting in the consummation of the assault.'" *Id.* at 696 (quoting *Fenwick v. Oberman,* 847 A.2d 852, 855 (R.I. 2004)).

Mr. Cook may have been prejudiced if the inconsistent testimony relates to the elements of assault or battery. *Wilson*, 185 F.3d at 991. Here, the so-called inconsistent testimony is not at all related to the elements of assault or battery. A portion of cross-examination focused on whether Ms. Sunderland tackled Mr. Cook, whether the two fell together on the kitchen floor, and who had possession of Mr. Cook's cell phone during the argument. Neither of the two incidents relates to any physical acts of the defendant. Thus, the discussion between Mr. Cook and the State on cross-examination of the minor details do not prejudice Mr. Cook because they do not relate to the elements of the charges. *Id.* at 991.

Lastly, while his testimony on cross-examination does go to his account of events, the inconsistencies were relatively minor and did not impact his overall testimony. *Wilson*, 185 F. 3d at 991. On direct examination, Mr. Cook testified that "[Ms. Sunderland] fell and knocked me over." (Trial Tr. 476:5, Mar. 13, 2015.) Mr. Guglielmo then addressed discrepancies between Mr. Cook's testimony and statement, which indicated that Ms. Sunderland had tackled Mr. Cook. However, Mr. Cook addressed the discrepancy himself by stating that "[he] explained [the incident in the statement] the way it happened from [his] best recollection from that day." *Id.* at 553:7-8.

In addition, Mr. Cook's testimony contains only minor discrepancies because he did not ever completely deny any of the events in the statements that Mr. Guglielmo asked about on cross-examination. *State v. Vento*, 533 A.2d 1161, 1165 (R.I. 1987). Rather, Mr. Cook stated that "[he] explained [the incident in the statement] the way it happened from [his] best recollection from that day." (Trial Tr. 553:7-8, Mar. 13, 2015.) On redirect examination, Mr. Cook also stated "[i]t felt like I was being tackled" and that the action happened quickly. *Id.* at 571:16-18. Upon further cross-examination on this point, Mr. Cook testified to the following: "[I was clobbered to the floor] [f]rom the back. On my back. I landed on my face. I was pushed and tackled from my back."

(Trial Tr. 591:6-7, Mar. 16, 2015.) Thus, although there are some inconsistencies, the fact that he did not completely deny the fall supports the argument that the discrepancy is relatively minor and not prejudicial.

Finally, the statement was addressed on redirect by Mr. Levy who attempted to explain any discrepancies relating to the relationship and cell phone. On redirect testimony, Mr. Cook explained any discrepancy by testifying that: (1) he dictated to his secretary who asked questions of him to create his statement; (2) he told his secretary the details as he then remembered them; (3) he did not check the accuracy of his statement; and (4) he did not expect the statement to be used in court.

The perceived inconsistencies are relatively minor issues. As mentioned above, Mr. Cook does not completely deny that the cell phone played a role in the argument, and he ultimately agrees that the relationship ended. Thus, the substance of his testimony is essentially the same. *See, e.g., State v. Briggs*, 886 A.2d 735, 745 (R.I. 2005) (finding no clear abuse of discretion when a trial justice did not allow the defendant to question a witness on an inconsistent statement in which the witness at one time remembered the contents of a television program and could no longer remember them at trial). Indeed, the inconsistencies raised only go to the credibility of Mr. Cook on insignificant details with the jury but remain miniscule compared to the weight of the evidence as a whole relating to the July 7, 2013 incident. *See* S*tate v. Guerrero*, 996 A.2d 86, 90 (R.I. 2010) (in reviewing a decision on a motion for a new trial, our Supreme Court has consistently distinguished between "inconsistencies on 'minor details'" and inconsistencies "on the crucial issues").

As such, the Court is satisfied that the use of the statement on cross-examination relating to the July 7, 2013 incident was not a determinative factor in his conviction. Rather, the weight of

the evidence—including victim testimony, medical testimony, and a recording of the incident—adequately provided a foundation for the jury to return a verdict. Accordingly, perceived inconsistencies—and Mr. Cook's subsequent assertion that the jury relied upon them in formulating their verdict—is of no moment to the Court because said inconsistencies did not deprive Mr. Cook of a fair, reliable trial. *See State v. Moore*, 154 A.3d 472, 482 (R.I. 2017) (finding that disparities between the various witnesses' recounts were numerous but said inconsistences reflected no more than minor details). Rather, perceived inconsistences speak towards his credibility as a witness but could not overcome insurmountable tangible evidence proffered by the State during trial. *See Wilson*, 185 F.3d at 991. The Court is unpersuaded that relatively minor discrepancies and the subsequent use on cross-examination played a direct role in the verdict.

2

Comparing the State's Evidence for the June Acquittal and July Guilty Finding

There are notable differences in the strength of the evidence against Mr. Cook for the two separate incidents. For the June 23, 2013 incident, there was testimony that Ms. Sunderland got back together with Mr. Cook immediately after the incident; she did not report the first incident to the police right away; and she described the incident to her medical providers as an altercation. Moreover, the injuries sustained could be attributed to the rough sex as described in Mr. Cook's statement. After the July 7, 2013 incident, Ms. Sunderland immediately sent text messages to Mr. Cook—essentially documenting her allegation against him—unlike the June 23, 2013 incident, which she did not allege until her August 30, 2013 police report. Notably, when faced with Ms. Sunderland's detailed and concise allegation via text message, Cook did not rebut the allegation but rather apologized, a detail that the State stressed in its closing.

Moreover, there was a powerful difference in the medical records and testimony when comparing the two incidents. Dr. Pinkes testified that Ms. Sunderland's chief complaint from her June 24, 2013 visit to Landmark Medical Center was that she was in an altercation and complaining about redness to [her] left eye as well as shoulder pain. (Trial Tr. 364:1-2, Mar. 12, 2015.) Dr. Pinkes further testified that Ms. Sunderland made no reference to being choked and he explained that there are many causes of the specific eye redness that she was experiencing. *Id*. at 373:1-4; 364:13. Moreover, he testified that Ms. Sunderland neglected to have an x-ray of her shoulder done. *Id*. at 365:24.

Conversely, Dr. Pinkes testified to Ms. Sunderland's medical records from her visit to Landmark Medical Center on July 7, 2013. He testified that on July 7, 2013 at 3:52 a.m., the medical records indicated that Ms. Sunderland's chief complaint was that she was "punched in the nose by her boyfriend." *Id*. at 358:9-14. He also testified that the nurse's notes indicated that an x-ray was completed, there was a positive nasal fracture, and that the patient wanted to notify the police. *Id*. at. 361:1; 368:17-20. Notably, Dr. Pinkes testified that Ms. Sunderland's nose fracture was an uncommon nasal fracture; specifically, he testified that Ms. Sunderland broke the anterior nasal spine, meaning the upper part of the jaw and the lower part of the nose. He testified that this part of the nose is not easily broken and requires a significant amount of force to be broken. *Id*. at 362:15-16; 377:16-23.

Furthermore, the State introduced photographs of Ms. Sunderland, taken by the Burrillville Police Department in the aftermath of the July 7, 2013 incident. The photographs included pictures of: (a) her left eye with redness; (b) her back right shoulder with a bruise and red marks; (c) a bruise on her left shoulder area; (d) her lower lip area showing a bruise; and (e) her upper arm area showing bruises. (Trial Tr. 120:24-121:8; 121:15-20; 122:10-15, 18-19; 123:18-20, Mar. 11,

2015.) Lastly, the State introduced an almost three-minute audio recording of the July 7, 2013 incident recorded by Ms. Sunderland using her cell phone while the parties were in the bathroom. (Trial Tr. 341:24-343:5, Mar. 12, 2015.)

Unlike the first incident in which Ms. Sunderland described the cause of her injuries as an altercation, in her July 7, 2013 medical visit, she specifically told the medical providers that the cause of her injury was that her boyfriend punched her in the face, and she wanted to notify the police immediately. Furthermore, Dr. Pinkes' testimony regarding Ms. Sunderland's broken nose—and the unique nature and location of the break—was consistent with Ms. Sunderland's testimony about her injury.

Accordingly, it is likely that even without the use of Mr. Cook's personal statement to impeach him, there was substantial evidence for a reasonable jury to convict him of the charges stemming from the July 7, 2013 event. The evidence in the June incident did not rise to that level. The evidence was consistent with the Defendant's theory that the injuries were not caused by an assault but rather by rough sex.

3

Failure to Object to the State's Use of Mr. Cook's Statement

Mr. Cook also alleges that Mr. Levy engaged in deficient performance when he failed to object to the State's use of Mr. Cook's written statement on cross-examination. Mr. Cook provides two possible rationales for an objection. First, he states that Mr. Levy could have objected to the statement based on attorney-client privilege. Second, he provides that Mr. Levy should have objected to the testimony as violative of Rule 410 of the Rhode Island Rules of Evidence, which renders statements made during plea negotiations inadmissible. Ultimately, he asserts that the failure to object permitted the jury to seriously consider the statement in their deliberations.

Failing to object at certain points at trial does not amount to constitutionally ineffective assistance of counsel when such actions reflect a legitimate defense strategy. *Toole v. State*, 748 A.2d 806, 810 (R.I. 2000). The United States Supreme Court provides: "Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)).

Attorneys are still considered to act reasonably when they refrain from objecting in the following circumstances: to avoid calling the jury's attention to damaging facts that might otherwise be overlooked, to avoid alienating the jury, or because the evidence is immaterial. *Toole*, 748 A.2d at 810. Additionally, it is reasonable to create the appearance of being forthcoming to the jury. *See Walls v. Buss*, 658 F.3d 1274, 1279 (11th Cir. 2011) (finding the trial lawyer's strategy not to seek to exclude a recorded statement was consistent with a reasonable trial strategy to be forthcoming to the jury when the recording—while arguably incriminating—played into the defense theory). Further, when considering the prejudicial effect, objections can be rendered harmless "in light of the substantial other evidence inculpating [the defendant.]" *Toole*, 748 A.2d at 810.

Mr. Levy's testimony explains that he found the discrepancies meaningless. *See id.* According to Mr. Levy, he "took the position that the document [Mr. Cook's written statement] wasn't harmful to his interest." (PCR Hr'g Tr. 10:21-22, June 20, 2018.) When asked whether Mr. Cook was impeached with his statement at the criminal trial, Mr. Levy replied: "That's a matter of interpretation. I don't think he [Mr. Guglielmo] impeached him." *Id.* at 12:25-13:1. Conversely,

Mr. Guglielmo later testified that it was his "recollection" that he used the statement to impeach Mr. Cook "[a] little bit" about the July 7, 2013 incident. (PCR Hr'g Tr. 18:2-6; 17:2, Nov. 2, 2017.)

In addition, Mr. Levy indicated that he did not find the written statement to be harmful from the first time he reviewed the information package and any accompanying documents. (PCR Hr'g Tr. 10:24-25, June 20, 2018.) Next, when asked whether Mr. Cook testified inconsistently with his statement, he responded: "No. I don't believe he did." *Id.* at 10:7. He added "My recollection is no." *Id.* at 10:10. Mr. Levy did not believe the statement hurt Mr. Cook's case. *Id.* at 19:4-5. He did not recall specific incidents of Mr. Cook's testimony deviating from his written statement. *Id.* at 24:18-20.

Mr. Levy testified that "[g]enerally speaking," he does not believe Mr. Cook's testimony to be inconsistent with his statement. *Id.* at 18:15-18. Indeed, the Court is satisfied that Mr. Levy could not render objectively unreasonable counsel by failing to object to the alleged privileged statement when it was his belief that the statement had been previously presented to the State by Mr. Patriarca, thus waiving privilege. *See DeCurtis v. Visconti, Boren & Campbell, Ltd.*, 152 A.3d 413, 425 (R.I. 2017) (quoting *State v. von Bulow*, 475 A.2d 995, 1005 (R.I. 1984)) (""it is well established that the attorney-client privilege can be waived 'when there has been disclosure of a confidential communication to a third party.'"'). Therefore, consistent with the deference given to attorneys in making trial decisions, Mr. Cook cannot successfully claim that his attorney was ineffective when he did not object to the written statement on the basis of privilege. *See McCoy*, 138 S. Ct. at 1508; *see also Rice v. State*, 38 A.3d 9, 17 (R.I. 2012). As such, Mr. Levy's indications that it was his belief that the statement was not incriminating, consequential, or even privileged must be viewed in a deferential light by this court. *Jaiman v. State*, 55 A.3d 224, 238 (R.I. 2012).

With this standard in mind, Mr. Cook has failed to establish that trial counsel's failure to object to the use of the statement during cross-examination was objectively unreasonable. *See id*.

Thus, it is Mr. Levy's testimony that he believed there was nothing incriminating in the statement and that ultimately the statement did not harm Mr. Cook. Mr. Cook testified that he spoke to Mr. Levy after his written statement was used on cross-examination and that Mr. Levy recalled Mr. Cook to the stand to explain the statement. However, the written statement and cross-examination was relatively innocuous when compared with the overwhelming evidence against Mr. Cook and the lack of connection to the actual elements of the charges against him. *Id*.

The more difficult issue is whether Mr. Levy misstepped when he failed to object at trial to the State's use of Mr. Cook's statement on the grounds it may have been used in the furtherance of plea negotiations. Mr. Levy indicated that "[he] didn't know what [Mr. Patriaraca's] intent was" but he did not think the statement was drafted specifically for a plea. (PCR Hr'g Tr. 27:12, June 20, 2018.) However, Mr. Levy further stated that "[he] thought Mr. Cook hoped that Mr. Guglielmo would review [the statement] and dismiss the case" and that this constituted a negotiation in his estimation. *Id*. at 27:22-25. With the understanding that the statement may have been a negotiation, Mr. Levy further admitted that he did not object to its use during cross-examination during Mr. Cook's trial. Accordingly, Mr. Levy's failure to object to the introduction of the statement on the basis of its possible use in furtherance of negotiations could be considered an objectionably unreasonable performance.

Rule 410 of the Rhode Island Rules of Evidence renders statements made during plea negotiations inadmissible and provides in pertinent part:

> "Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: . . . (4) any statement made in the course of plea

> discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or nolo contendere or which result in a plea of guilty or nolo contendere later withdrawn. . . ." R.I. R. Evid. 410.

However, not every discussion between an accused and agents for the government constitutes a plea negotiation. *See generally United States v. Robertson*, 582 F.2d 1356, 1365 (5th Cir. 1978). It is well-settled that when determining the applicability of Rule 410, a court must first determine if the plea bargaining process is underway by '". . . apply[ing] a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances."' *State v. Traficante*, 636 A.2d 692, 695 (R.I. 1994) (quoting *Robertson*, 582 F.2d at 1366). Accordingly, the critical element of this analysis is "defining the defendant's subjective intent and expectations." *Id*. However, in relation to the accused's subjective expectation, '"[t]he initial inquiry . . . *must be made with care to distinguish between those discussions in which the accused was merely making an admission and those discussions in which the accused was seeking to negotiate a plea agreement*." *Id*. at 696 (emphasis in original) (quoting *Robertson*, 582 F.2d at 1367).

In *Traficante*, our Supreme Court adopted the *Robertson* two-tiered analysis and further expounded on the analysis required. In overturning a lower-court decision ruling certain statements inadmissible, the Supreme Court held that a defendant did not exhibit any subjective expectations of negotiating a plea at a meeting between himself, his attorneys, state prosecutors and police. *Id*. Rather, the defendant's attorneys testified that they never offered to have the defendant plead guilty and were under the impression the purpose of the meeting was to convince state officials not to press charges. *Id*. at 694. As a result, the Court found testimony by the defendant that he relied

upon his attorneys' representations and did not contemplate pleading guilty to any crime, persuasive evidence that he did not exhibit a subjective intent to plead guilty. *Id*. at 698.

Consequently, the Court continued and found that the objective circumstances surrounding the matter illustrated that a plea bargain expectation was unreasonable. *Id*. at 697. The Court found that the defendant did not contemplate entering a guilty plea in order to obtain government concessions, therefore, the necessary "quid pro quo" of negotiation was missing. *Id*. The defendant did not ask for immunity; there was no discussion of possible criminal or civil penalties the defendant would accept; and there were no criminal allegations pending. *Id*. Therefore the Court believed that the defendant's asserted intent that plea bargaining had taken place was not objectively reasonable based on the totality of the circumstances.

Here, the Court is satisfied that Mr. Cook provided the statement in an effort to "prove that the victim in the case was lying as far as the timing of the incident that had occurred." (PCR Hr'g Tr. 29:23-25, Nov. 2, 2017.) Moreover, the Court believes that the subjective intent of Mr. Cook was to discredit Ms. Sunderland, and so "Mr. Guglielmo would have Mr. Cook's version of events" prior to trial. (PCR Hr'g Tr. 8:5-6, June 20, 2018.) Mr. Cook requested that the statement be given to the State with the hope that it served as exculpatory evidence which would allow him to be relieved of the charges levied against him, rather than to negotiate a plea deal. *See Robertson*, 582 F.2d at 1369 (holding that when a bargained confession is given absent contemplation of entering plea of guilty the "quintessential Quid of a plea negotiation Quid pro quo was missing.") Specifically, on a number of occasions Mr. Levy testified that "[his] understanding from speaking to Mr. Cook numerous times was he was innocent. He wanted a trial. So I didn't think that this was for plea negotiations." (PCR Hr'g Tr. 27:17-20, June 20, 2018.) Notably, there is no admission of any guilt in the statement. Mr. Cook's statement is a report of action between himself and the

complaining witness. Mr. Cook never testified to a different accounting of events nor did he recant anything in the statement. Mr. Cook, as is common with domestic violence allegation cases, was trying to control the narrative and place the onus upon the complaining witness to explain her actions.

Accordingly, the Court is satisfied that the statement was not provided to the State in the context of a plea negotiation. *See Traficante*, 636 A.2d at 695 (quoting *United States v. Levy*, 578 F.2d 896, 901 (2d Cir. 1978)) ("'*Plea bargaining implies an offer to plead guilty upon condition*. The offer by the defendant must, in some way, express the hope that a concession to reduce the punishment will come to pass.'") (Emphasis in original.) Any privacy expectation of Mr. Cook was not reasonable. Mr. Patriarca advised Mr. Cook that providing the statement to the State would be harmful and that the State would not dismiss the case. Indeed, Mr. Patriarca indicated that he sought an extended suspended sentence, but the State was consistent in its desire for jail time. Furthermore, Mr. Cook knew that if the case was not dismissed, it would likely progress to trial.

Admittedly, negotiations between Mr. Patriarca and Mr. Guglielmo were ongoing but the Court is satisfied that the particular intent behind this statement was to advance Mr. Cook's depiction of events in the hope that all charges would be dropped. As such, Mr. Cook's statement more closely reflects an attempted explanation rather than a discussion in furtherance of a plea bargain and does not exhibit an offer to plead guilty upon condition. *See Traficante*, 636 A.2d at 697. Mr. Levy's failure to object to the statement on the grounds it was made in furtherance of plea negotiation may constitute a misstep but did not prejudice Mr. Cook because the statement cannot now be categorized as made for the purposes of plea negotiations as outlined in *Traficante*. Therefore, Mr. Cook's contention that he was rendered ineffective counsel by failing to object on

the basis of Rule 410 is of no moment. Said statement, which was made to discredit a key witness in hopes of having all charges dropped, lacks the necessary "quid pro quo" of negotiation.

Even if, *arguendo*, Petitioner's counsel's performance was constitutionally deficient for failing to object on plea negotiation grounds and his representation fell below an objective standard of reasonableness, Petitioner would still need to be able to meet the prejudice prong under *Strickland. See* 466 U.S. at 694 ("The [applicant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). In the case at bar, there was overwhelming evidence of the Petitioner's guilt relating the July 7, 2013 incident. *See Otero v. State*, 996 A.2d 667, 672 (R.I. 2010) (finding Petitioner not prejudiced by counsel's failure to object to expert testimony or failure to proffer evidence of competency because ample evidence supported State's position). Specifically, testimony offered by Ms. Sunderland and Dr. Pinkes, in addition to photographs and audio recordings of the incident, provided ample evidence for a jury to return a guilty verdict on the July 7, 2013 incident.[1] The Court is satisfied that any perceived prejudice is of no moment as the direct testimony and evidence proffered fails to undermine confidence in the outcome. *See id.* Accordingly, the Petitioner has failed to meet his burden illustrating prejudice resulting from the alleged unreasonable actions of Mr. Levy in failing to object to the use of the statement.

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[1] This testimony and evidence is discussed in depth supra and the Court incorporates said discussion into its ruling that Petitioner has failed to demonstrate prejudice by Mr. Levy.

IV

Conclusion

For the reasons stated herein, Petitioner failed to satisfy his burden in proving by a preponderance of the evidence that he is entitled to postconviction relief. Specifically, Petitioner has failed to present sufficient evidence to overcome the heavy burden imposed via the two-prong analysis imposed by *Strickland*. Accordingly, Petitioner's Motion is hereby denied.

Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE:	State of Rhode Island v. Noah L. Cook
CASE NO:	PM-2017-0209
COURT:	Providence County Superior Court
DATE DECISION FILED:	October 8, 2019
JUSTICE/MAGISTRATE:	McGuirl, J.

ATTORNEYS:

For Plaintiff:	Daniel Guglielmo, Esq.
For Defendant:	James M. Hanley, Esq.