STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 18, 2021)

JESUS FUENTES	:	
	:	
VS.	:	**C.A. No. PM-2017-4515**
	:	**(P1-2010-0203AG)**
STATE OF RHODE ISLAND	:	

DECISION

KRAUSE, J. After a jury trial in June 2010, Fuentes was convicted of the first-degree murder of Henry Vargas and a related count of discharging a firearm while committing a crime of violence, resulting in Vargas' death. As statutorily mandated, the Court sentenced Fuentes to two consecutive life prison terms. G.L. 1956 §§ 11-23-2, 11-47-3.2(b)(3) [now recodified as (b)(4)].

Fuentes' conviction was affirmed by the Supreme Court, *State v. Fuentes*, 162 A.3d 638 (R.I. 2017), which contains a full explication of the facts. The only notable factor pertinent to the instant matter is that the state's case largely rested on the testimony of Carmen Bueno, Vargas' girlfriend and the only witness who saw Fuentes shoot Vargas.

In this postconviction relief application, Fuentes principally complains that his trial attorney, Gary Pelletier, an experienced criminal defense practitioner, and his appellate counsel, Lara Montecalvo (then Chief of the Public Defender's Appellate section and now this state's Public Defender), rendered impermissibly substandard assistance. He criticizes Mr. Pelletier for not engaging an identification expert and faults attorney Montecalvo for not raising in his direct appeal this Court's refusal to include a "mere presence" admonition in the jury instructions.

The parties have filed ample briefs, along with relevant exhibits, and have agreed that Mr. Pelletier's March 17, 2021 Affidavit comprises the substance of what his testimony would have

been at a postconviction relief hearing. The parties have also agreed that the Court may decide this matter based upon those submissions without convening a hearing. Having examined those materials and the relevant portions of the record, the Court agrees that the facts and legal contentions have been adequately presented and that further proceedings would not aid the decisional process.

Strickland, et al.

The benchmark for a claim of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668 (1984), which has been adopted by the Rhode Island Supreme Court. *Brennan v. Vose*, 764 A.2d 168, 171 (R.I. 2001); *LaChappelle v. State*, 686 A.2d 924, 926 (R.I. 1996). Whether an attorney has failed to provide effective assistance is a factual question which a petitioner bears the "heavy burden" of proving. *Rice v. State*, 38 A.3d 9, 17 (R.I. 2012); *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (noting that *Strickland* presents a "high bar" to surmount). When reviewing a claim of ineffective assistance of counsel, the question is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Heath v. Vose*, 747 A.2d 475, 478 (R.I. 2000).

A *Strickland* claim presents a two-part analysis. First, the petitioner must demonstrate that his attorney's performance was deficient, which requires a showing that counsel made errors that were so serious that the attorney was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *Powers v. State*, 734 A.2d 508, 522 (R.I. 1999). Furthermore, a petitioner "must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and sound trial strategy." *Hughes v. State*, 656 A.2d 971, 972 (R.I. 1995); *Gonder v. State*, 935 A.2d 82, 86 (R.I. 2007).

Even if the petitioner can satisfy that initial step, he must also demonstrate that counsel's deficient performance was prejudicial. In other words, he is required to show that a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Hazard v. State*, 968 A.2d 886, 892 (R.I. 2009).

Ordinarily, tactical decisions by trial attorneys do not, even if hindsight proves the strategy unwise, amount to defective representation. "As the *Strickland* Court cautioned, a reviewing court should strive 'to eliminate the distorting effects of hindsight.'" *Clark v. Ellerthorpe*, 552 A.2d 1186, 1189 (R.I. 1989) (quoting *Strickland*, 466 U.S. at 689); *Linde v. State*, 78 A.3d 738, 747 (R.I. 2013). *See Rice*, 38 A.3d at 17 ("This Court 'will not meticulously scrutinize an attorney's reasoned judgment or strategic maneuver in the context of a claim of ineffective assistance of counsel.'"). *Id*. (quoting *Brennan*, 764 A.2d at 173).

Identification Expert

Fuentes primarily complains that trial counsel provided inadequate assistance by failing to engage an expert to testify about the imprecisions of eyewitness identification.

The short answer to that complaint is that he did attempt to secure an identification expert but, through no fault of his own, was unable to do so. In his March 17, 2021 Affidavit, Mr. Pelletier reports that he conferred with Nancy Steblay, Ph.D., "a nationally known expert on the issue of the weaknesses of eyewitness' testimony [who] quoted a fee of $12,000.00 to assess the case, draft a report, travel to Rhode Island and testify at the trial." The fixed June 2010 trial date, however, was incompatible with her schedule, and she would have been unable to consider the case until later that year. In any event, retaining her proved too costly, and the Court declined retained counsel's request to extract funds from the public fisc to underwrite her expenses because Fuentes was not considered indigent.

Moreover, trial counsel correctly recounts that the Court advised him that, under existing Rhode Island case law, it would be disinclined to admit such testimony anyway. *See generally, State v. Porraro,* 121 R.I. 882, 892, 404 A.2d 465, 471 (1979) (upholding the exclusion of eyewitness expert and observing that, in general, the trustworthiness of eyewitness identification is not beyond the normal ken of jurors); *State v. Day,* 898 A.2d 698, 707 (R.I. 2006); *State v. Werner*, 851 A.2d 1093, 1103 (R.I. 2004); *State v. Gomes,* 604 A.2d 1249, 1255 (R.I. 1992) (relevancy outweighed by confusing and misleading the jury); *State v. Gardiner,* 636 A.2d 710, 713-14 (R.I. 1994) (excluding identification expert on relevancy grounds); *State v. Sabetta*, 680 A.2d 927, 932-33 (R.I. 1996) (following *Porraro*); *State v. Martinez,* 774 A.2d 15, 19 (R.I. 2001) (*Morris* followed).

Notably, the Supreme Court rejected Fuentes' claim in his direct appeal that this Court had shortchanged him by failing to give *any* identification instruction, much less the cautionary eyewitness instruction he had requested, because Rhode Island law, at the time of Fuentes' trial, did not mandate that an identification instruction be given at all.[1]

Furthermore, the Supreme Court had regularly approved a trial judge's denial of public funds to an indigent defendant to hire an identification expert whose testimony would not have

[1] For decades the Rhode Island Supreme Court accorded trial judges wide discretion in deciding whether to offer an identification instruction, and the Court had never mandated that one be given. *State v. Andrade*, 544 A.2d 1140, 1143 (R.I. 1988). As long as the jury was told that the state was required to prove beyond a reasonable doubt that the defendant was, in fact, the person who committed the offense, "a trial justice is not required to give specific instructions [on identity."] *Andrade*, 544 A.2d at 1143; *State v. Desrosiers*, 559 A.2d 641, 645-46 (R.I. 1989); *State v. Maxie*, 554 A.2d 1028 (R.I. 1989); *Gomes*, 604 A.2d at 1256; *State v. Payette*, 557 A.2d 72, 73-74 (R.I. 1989) ("Hence it is established Rhode Island law that a specific jury instruction on identification is not mandatory and failure to give such an instruction is not reversible error. . . [A] general instruction is preferable on the rationale that a specific instruction may be construed to be partisan comment by the trial justice."). The *Payette* sentiment has been recently renewed. *State v. Hampton-Boyd*, 253 A.3d 418, 424 (R.I. 2021).

been admitted at trial. *E.g., Day*, 898 A.2d at 706-07; *State v. Morris*, 744 A.2d 850 (R.I. 2000); *Martinez*, 774 A.2d at 18-19 (*Morris* followed); s*ee also, Barros v. State*, 180 A.3d 823, 832–33 (R.I. 2018) (affirming the trial court's denial of funds to hire an expert on false confessions, whose testimony would have been disallowed at trial and also noting the importance of "conserving . . . meager state resources in a situation where the requested expenditure would have been unnecessary").[2]

This Court is mindful that in the ten years since Fuentes' trial, the weight heretofore accorded to the accuracy of eyewitness identification, as well as a juror's assumed understanding of its potential shortcomings, have been more closely examined by professionals and courts in various jurisdictions, and our Supreme Court has also noted the alteration in that terrain in *State v. Davis*, 131 A.3d 679, 697 (R.I. 2016), and in its affirmance of Fuentes' conviction. *Fuentes*, 162 A.3d at 644-46.[3]

But the yardstick by which to measure trial counsel's efficacy is not in the context of recent developments and today's more cautious approach to eyewitness identification; rather, it must be

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[2] The *Barros* Court left open the possibility that a case might one day arise "in a different factual and procedural posture, where providing the funding for such an expert might be appropriate." *Id.* at 833 n.7. Barros was indigent and represented by the Public Defender. Whether that margin note was intended to extend to non-indigent defendants, such as Fuentes, is unclear. In any event, the Supreme Court's comment clearly reflects that a funding request should be declined, where, as here, the expenditure would ultimately have been "unnecessary," because such testimony would not have been admitted at trial.

[3] Even today, while the *Davis* Court recognized the growing awareness of "the problematic nature of eyewitness identification and its potential for misidentification," the Supreme Court has held that "a specific jury instruction on identification is not mandatory." *Davis*, 131 A.3d at 694, 696; *Hampton-Boyd*, 253 A.3d at 424. Although *Davis* observed that "the better practice would be for courts to provide the jury with more comprehensive instructions when eyewitness testimony is an issue," *id.* at 697, it nevertheless later characterized that observation as "aspirational dictum," *Fuentes*, 162 A.3d at 645 n.12, and reiterated that "*Davis* did not announce a new rule of law" mandating an identification instruction, but was, instead, a signal to trial courts not to overlook "the growing concern in other jurisdictions" and in scientific studies regarding the "questionable accuracy" of eye witness accounts." *Id.*

gauged by existing law at the time of trial. Providing "effective assistance of counsel does not involve the ability to accurately predict the future," *Bell v. State*, 71 A.3d 458, 462 (R.I. 2013). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms[.]'" *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). "We would emphasize that, in evaluating an attorney's performance under *Strickland*, our approach is to look at the legal landscape and what was known to the attorney *at the time at issue*." *Barros*, 180 A.3d at 833 (emphasis in original text).

Since an identification instruction was not even mandated at the time of Fuentes' trial, and because expert testimony on the subject of eyewitness frailty would have been blocked anyway; and where, as here, public funds would not have been provided to hire an identification expert, it most certainly was not ineffective assistance of Fuentes' trial counsel to have recognized the futility of trying to engage his chosen expert who was, in any case, unavailable and too expensive. *See Harrington*, 562 U.S. at 107 (noting that trial counsel who did not engage an expert "was entitled to formulate a strategy that was reasonable at the time and to balance limited resources").

Appellate Counsel

Fuentes also faults appellate counsel for not pursuing in his direct appeal a claim arising from the Court's refusal to include a "mere presence" charge in the jury instructions.

The *Strickland* standard for reviewing claims of ineffective assistance of counsel applies equally to trial and appellate attorneys. *Page v. State*, 995 A.2d 934, 943 (R.I. 2010). It is settled that appellate counsel "'need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal."' *Id.* (quoting *Chalk v. State*, 949 A.2d 395, 399 (R.I. 2008)). The *Page* Court wrote:

> "This Court has further stated that, in order to satisfy both prongs of the *Strickland* analytical scheme with respect to a claim that

> counsel's omission of an issue constituted the ineffective assistance of appellate counsel, 'an applicant must demonstrate that the omitted issue was not only meritorious, but 'clearly stronger' than those issues that actually were raised on appeal."' *Page*, 995 A.2d at 943-44 (quoting *Chalk*, 949 A.2d at 399).

This Court's mere presence instruction is drawn from *State v. Diaz*, 654 A.2d 1195, 1202 (R.I. 1995), and it is typically most useful in multi-defendant cases alleging conspiracy, aiding and abetting, or other joint venture allegations.[4] After a charge conference with counsel, which included discussion of that instruction, the Court decided not to include it. (Trial Tr. at 1123-27.) Frankly, the only substantive issue in Fuentes' case which invited any review, as appellate counsel recognized, was the eyewitness-identification matter. That issue, to which the Supreme Court devoted several pages and its entire focus, easily overbalanced the relevance and even usefulness, if any, of a mere presence instruction.

Seasoned trial counsel, regardless of his request to include the instruction, knew that the instruction was of little import to his case, because he never even bothered to suggest the proposition to the jury and didn't even acknowledge Fuentes' presence that night. Instead, he devoted his entire argument to what he contended was a faulty identification by the state's eyewitness. (Trial Tr. at 1183-1213.) Appellate counsel wisely narrowed the appeal to the identification issue and dispensed with the distracting mere presence instruction which trial counsel himself ultimately recognized was so insubstantial that he even declined to advocate it.

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[4] The instruction provides:

> "A defendant's mere presence at the scene of a crime, or his knowledge, if any, that a crime is being or is about to be committed, and his relationship, if any, with those who have committed or are going to commit a criminal offense are not, by themselves, sufficient to warrant a conviction.
>
> "They are factors, however, which you may consider in ultimately making your determination of whether or not the defendant is guilty of the charges which have been filed against him."

The onus upon a petitioner in the postconviction arena, especially to prove prejudice, is a "prodigious burden," *Evans v. Wall*, 910 A.2d 801, 804 (R.I. 2006), and it is one that is "'highly demanding and heavy.'" *Whitaker v. State*, 199 A.3d 1021, 1027 (R.I. 2019) (citing *Page*, 995 A.2d at 943 and quoting *Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006)). It is clear to this Court, as a front row observer of Fuentes' trial, that even if the mere presence instruction had been included in the Court's final charge (an approach trial counsel dispensed with in his summation anyway), it would have had absolutely no impact on the jury's verdict and would not have changed the result of this case. *Strickland*, 466 U.S. at 694; *Hazard*, 968 A.2d at 892.

Conclusion

Withal, Fuentes has failed to present any evidence which passes either of *Strickland*'s sentries with respect to any claim he has raised in his petition.[5] This Court concludes, as did the Supreme Court in *Anderson v. State*, 878 A.2d 1049, 1050 (R.I. 2005), that "[t]he conviction in this case was not a result of petitioner's attorney but, rather, the weight of the credible evidence against [him]."

Fuentes' application for postconviction relief is denied, and judgment shall enter in favor of the State of Rhode Island.

[5] Apart from the substantive issues herein which current counsel addressed in his brief, Fuentes also appended a specious and illusory compendium of other oneiric claims, all of which the Court has reviewed and found entirely baseless.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Fuentes v. State of Rhode Island**
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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 18, 2021**
JUSTICE/MAGISTRATE:	**Krause, J.**
ATTORNEYS:	
For Plaintiff:	**James T. McCormick, Esq.**
For Defendant:	**Judy Davis, Esq.**