IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

MOHAMMED ROBLE
-Petitioner-

Vs.

UNITED STATES OF AMERICA
-Respondent-

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SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION – FELONY BRANCH

UNITED STATES OF AMERICA	:	
	:	Docket No. 2013 CF1 6095
v.	:	Judge Morin
	:	Courtroom 215
MOHAMMED ROBLE	:	Hearing Date: 7/24/15

EXHIBIT A

ORDER

This comes before the court on Defendant Mohammed Roble's Motion for New Trial or, in the alternative, Judgment of Acquittal, pursuant to Superior Court Criminal Rules 29 and 33 and D.C. Code § 23-110, his Memorandum in Support thereof and the Government's Opposition thereto. For the reasons stated below, Mr. Roble's request for relief is denied.

Procedural History

Mr. Roble was arrested on April 13, 2013, at 4:00 a.m., and charged with first-degree sexual abuse, after police observed him prone and hovering over top of a sobbing Gebremedhin Tiblets as Ms. Tiblets lay on the ground in an alley near the 2600 block of Georgia Avenue, NW.

On April 13, 2013, Mr. Roble was presented on a charge of first-degree sexual abuse. The court appointed Matthew Davies to represent Mr. Roble. On May 31, 2013, Mr. Roble entered a pre-indictment guilty plea to one count of Attempted First Degree Sexual Abuse and one count of kidnapping. Prior to sentencing, Mr. Roble requested new counsel and to withdraw his guilty plea. On July 9, 2013, Mr. Davies filed a motion to appoint independent counsel, which the court granted on July 12, 2013. On August 23, 2013, this court appointed Anne Keith Walton as Mr. Roble's counsel. Thereafter, the court allowed Mr. Roble to withdraw his guilty plea on September 16, 2013.

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On November 6, 2013, the court arraigned Mr. Roble on a four-count indictment including kidnapping and first-degree sexual abuse.

On November 25, 2013, Mr. Roble wrote a letter to this court, wherein he alleged that: (1) the indictment was defective; (2) the government had tampered with the evidence; and (3) his counsel had failed to adequately investigate and pursue his case. (Govt. Ex. 1) The court substantively addressed the letter with Mr. Roble and his counsel during a status hearing held December 4, 2013. Ms. Walton advised the court that she had investigated Mr. Roble's case, had spoken with the central witnesses, including the victim, and had been working the DNA aspects of the case. Ms. Walton also confirmed that she had received discovery, and she and Mr. Roble had reviewed the video tape of Mr. Roble's three-hour interrogation. When the court expressed satisfaction with counsel's progress, Mr. Roble explained that his counsel, at times, failed to communicate all of the points he considered important and that she was reluctant to send an investigator to interview all of the witnesses. This court advised Mr. Roble to be patient and to work with his counsel, as counsel would apprise him of the work done on his behalf. The court also promised to revisit the issue at a later date.

At a trial readiness hearing held on March 24, 2014, the court revisited Mr. Roble's pre-trial complaints levied against his counsel and the government. The court confirmed that Mr. Roble's indictment had been obtained properly; there was no prosecutorial misconduct with respect to Mr. Roble's transfer to and from Virginia on unrelated criminal matters; the defense had pursued independent DNA testing of the evidence and requested no further testing before trial; and Mr. Roble was then satisfied with his counsel's representation.

Mr. Roble's jury trial commenced on March 27, 2014. On April 4, 2014, the jury found Mr. Roble guilty of all charges. On May 23, 2014, the court sentenced Mr. Roble to a combined term of 192 months' confinement, followed by 60 months of supervised release.

On April 8, 2014, Mr. Roble sent a letter to the court containing complaints regarding Ms. Walton's representation before and during trial. As a result, the court appointed him a third lawyer, Mr. Irving, on April 11, 2014. On that date, Mr. Irving orally requested an extension of time to file a Motion for New Trial or Motion for Judgment of Acquittal. Mr. Irving filed a Motion for New Trial or Motion for Judgment of Acquittal, along with a motion to late file, on June 12, 2014. Mr. Irving filed a second and third supplemental and the government filed oppositions thereto.

Initially, Mr. Roble alleged six claims of ineffective assistance of counsel in support of his motion, *i.e.*, that counsel was ineffective for having failed to: (1) move for a bench trial as requested; (2) allow Mr. Roble to participate in jury selection; (3) adequately investigate, prepare, and call exculpatory eyewitnesses Sharmake Muhammed, Solomon Yegzaw, Adam Abraham, and an unspecified medical expert; (4) object to the prosecutor's opening statement and make her own concise opening statement; (5) suppress a white tank top; and (6) impeach the victim with prior inconsistent statements contained in the SANE report. (Def.'s Mot. at 2-3) He also attacked the sufficiency of the evidence supporting his conviction and argued that this court's deficient handling of his pretrial claims of ineffective assistance of counsel shifted the burden of proof to the government in any post-trial proceeding. (*Id.* at 3)

On June 24, 2014, this court ordered the government to respond to Mr. Roble's motion. On August 22, 2014, the government filed a motion for an order confirming the waiver of the attorney-client privilege and for an order compelling production of documents, and a motion for

a sixty-day enlargement of time from the date this court issued its order confirming the waiver of the attorney-client privilege. On August 25, 2014, the government filed a motion to unseal the record of proceedings in this case for December 4, 2013.

On August 25, 2014, this court issued an order confirming the waiver of the attorney-client privilege and authorizing counsel, *inter alia*, to disclose information retained in counsel's files related to the issues raised in Mr. Roble's motion. The government filed its opposition on October 7, 2014.

Mr. Roble filed supplements to his motion on January 12, April 2, June 5, and October 23, 2015, expanding his claims to include allegations that his counsel was also ineffective for failing to present Yenenh Hailu as a defense witness; coercing Mr. Roble to forego his right to testify; and for failing to retain a Swahili interpreter for Mr. Roble at trial. On October 26, 2015, the court concluded that its *Monroe-Farrell* inquiry into Mr. Roble's pretrial claims of ineffective assistance of counsel had been legally sufficient and thus the burden of proof as to ineffective assistance of counsel claims remained with him.[1]

The court granted a motions hearing and, on October 26-29, 2015, heard testimony from Mr. Roble, Yeneneh Hailu, Dr. Noureddine, Ms. Walton, and defense investigator George Steele. Thereafter, the parties filed proposed findings of fact to which the court now makes the following findings and rulings.

The Trial

The evidence at trial was as follows.

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[1] *Monroe-Farrell* refers to the holdings in *Monroe v. United States*, 389 A.2d 811 (D.C. 1978) and *Farrell v. United States*, 391 A.2d 755 (D.C. 1978).

Even if the burden was on the government, however, the court would reach the same result for the reasons stated herein; notably, that the overwhelming evidence of the guilt establishes that Mr. Roble did not suffer sufficient prejudice to justify relief.

On the evening of April 12, 2013, Ms. Tiblets visited her hair dresser before joining friends at a nearby Ethiopian restaurant. At approximately 2:30 a.m. on Aril 13, 2013, she left the restaurant and encountered a friend, Samuel Tekle, who was with one of his friends. The three then walked toward U Street, as Mr. Tekle tried to persuade Ms. Tiblets to join him and his friend for additional revelry. When Mr. Tekle saw a cab driver friend standing nearby with his cab and Mr. Roble, the entire group entered the cab and proceeded to the 2600 block of U Street, NW, where Ms. Tiblets promised to usher the men into a private after-hours party before heading home on her own.

Once at the location near the after-hours club, Ms. Tiblets walked the men through the alley and identified the back door of the home where the private party was being held. She then left the men and began walking back through the alley toward Georgia Avenue in search of the cab that she had anticipated using for her return home. However, she never had the opportunity to locate the cab because Mr. Roble ran toward her, grabbed her by her arms, and pulled her deep into the shadows of the alley. When she shouted for help, Mr. Roble suffocated her screams, wrapped his hands around her neck, and threw her to the ground. Mr. Roble then picked her up and dragged her toward the rear of the alley next to a dark SUV. There, he pulled aside Ms. Tiblets' pants and attempted to force his penis inside Ms. Tiblets' vagina. Because Mr. Roble's non-erect penis impeded his intent, he forced his fingers inside her vagina multiple times instead. Ms. Tiblets was menstruating at the time.

Daniel Diaz, who lives in a third floor apartment located at 2612 Georgia Avenue, NW, which overlooks the alley where the assault occurred, was home that morning and overheard frightened female screams saying: "Stop it. No. Stop. I have a family." When he looked out his living-room window, he saw a woman on the ground and a man hovering over top of her. The

man then picked the woman up and moved her back and next to a black SUV, as the woman continued to yell: "Stop it. Stop it." He saw arms flailing back and forth as the man appeared to rip the woman's clothes off, strike the woman in a violent manner, hover over top of her, and kneel between her legs. He described the man as dark brown-skinned, with a slim build, between 6' to 6'2" tall, and weighing approximately 170 pounds, wearing a black and white shirt, black hat, and black pants. Having witnessed these things, Mr. Diaz telephoned the police and reported a "rape" that was still in progress.

Metropolitan Police Department (MPD) Officers Dora Pacheco and James Rimensnyder responded to the radio dispatch for this event and proceeded in a marked cruiser without any siren to the alley near the 2600 block of Georgia Avenue. Once they turned down the alley, Officer Pacheco heard a woman scream off to the right. There, she saw Mr. Roble on his knees with his back toward Pacheco, hovering over Ms. Tiblets, who was lying on her back on the ground. Ms. Tiblets was crying, her clothes were dirty, she had leaves in her hair, and she was not wearing any shoes.

When Officer Rimensnyder exited the police cruiser and approached Mr. Roble, he noted that Mr. Roble was fumbling with something in the front of his pants. Officer Rimensnyder cuffed Mr. Roble's hands behind his back and placed him into the police cruiser where he later noted that the zipper to Mr. Roble's pants was undone. Once at the station, the police seized Mr. Roble's clothing, *i.e.*, his black pants, white and black striped shirt, white tank top undershirt, vest, and two pair of underwear, swabbed Mr. Roble's hands and penis, and sent all of this evidence for analysis.

Ms. Tiblets was also transported to Washington Hospital Center for a sexual assault exam conducted by SANE nurse Stacia Shryock. During the exam, the nurse noted scratches and

bruises to the right side of Ms. Tiblets' neck, nose, hands, arm, buttocks, and back and visible abrasions to her interior vaginal region. Swab and smear samples collected from the affected areas of Ms. Tiblets' body as part of the sex kit were later sent for DNA and blood analysis.

Emily Head, a forensic biologist and DNA analyst, concluded that DNA extracted from the blood stain found on Mr. Roble's white tank top t-shirt matched Ms. Tiblets' known DNA. Head also concluded that Ms. Tiblets could not be excluded as the source of the epithelial fraction of DNA found within Mr. Roble's penile swabs or as one of the contributing sources of the mixed DNA found on Mr. Roble's hands and fingers.

At trial, Dr. Suzanne Rotolo testified as a government expert regarding the injuries documented on Ms. Tiblets including that an abrasion to the neck was consistent with a fingernail, the abrasions were not consistent with someone falling on their own, the abrasions were consistent in time with the complainant's story, and an abrasion to the vagina was consistent with a fingernail scraping.

For her part, Ms. Tiblets testified that Mr. Roble had assaulted her by choking and by trying to penetrate her vagina with his penis and by penetrating her vagina with his fingers. However, trial counsel for Mr. Roble impeached her by bringing out inconsistencies in her versions of what happened, including the fact that she had lied to the police and the grand jury about taking Mr. Roble and others to an after-hours party behind the alley of Georgia Ave.

Counsel for Mr. Roble also argued that Ms. Tiblets' testimony was contradicted by Samuel Tekle, an active-duty US Navy personnel, who denied Ms. Tiblets' version of events that he was pushing her to stay because he was depressed or that she was looking for a taxi to go home. He also testified that Ms. Tiblets never spoke with Mr. Roble in the cab, and that he came

out of the after-hours party once the police arrived and saw nothing wrong with Ms. Tiblets' hair or clothing.

Mr. Roble voluntarily waived his right to testify in his own behalf and presented Detective Yvette Maupin as the only defense witness. Maupin testified that in April 2013 she was part of the MPD Sexual Assault Unit and had responded to the 2600 block of Georgia Avenue in this case. During the course of her activities, Maupin spoke to Ms. Tiblets for thirty minutes, and she never told Maupin that she had escorted four men to an after-hours party before her assault.

Standard of Review for Motion for New Trial

Under Superior Court Criminal Rule 33, the trial court may grant Mr. Roble's motion for a new trial "if the interests of justice so require." Super. Ct. Crim. R. 33. Whether to grant a Rule 33 motion lies within the trial court's sound discretion. *See United States v. Mastro*, 570 F. Supp. 1388, 1390 (E.D. Pa. 1983).[2] "The provision of Rule 33 permitting a new trial if required in the interest of justice though temperately to be utilized, is broader in scope than the limitations which have been held applicable where the motion is based on newly discovered evidence." *Sellars v. United States*, 401 A.2d 974, 979 (D.C. 1977). Claims of ineffective assistance of counsel are appropriately filed under this rule and are to be evaluated as if it were a motion filed under § 23-110. *Johnson v. United States*, 585 A.2d 766 (1991).

To prevail on an ineffective assistance of counsel claim, Mr. Robles must prove that: (1) his counsel's performance was deficient, and (2) the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U. S. 668, 687 (1984). Counsel's performance is constitutionally

[2] As Super. Ct. Crim. R. 33 is identical to Fed. R. Crim. P. 33, the District of Columbia Courts of Appeals construes Super. Ct. Crim. R. 33 consistently with the federal rule and, in the absence of applicable local precedent, looks to the case law construing Fed. R. Crim. P. 33. *See Williams v. United States*, 374 A.2d 885, 889 n. 6 (D.C. 1977); *Waldron v. United States*, 370 A.2d 1372, 1373 (D.C. 1977).

deficient if he or she "made errors so serious that counsel was not functioning as counsel guaranteed the defendant by the Sixth Amendment." *Id.* To meet this standard, the defendant must show that, in light of all the circumstances as they appeared at the time of the conduct, "counsel's representations fell below an objective standard of reasonableness," or "prevailing professional norms." *Id.* at 688, 690; *Nix v. Whiteside*, 475 U.S. 157, 165 (1986); *Watson v. United States*, 536 A.2d 1056, 1065 (D.C. 1987) (en banc), *cert denied*, 486 U.S. 1010 (1988); *Kuhn v. United States*, 900 A.2d 691, 698 (D.C. 2006).

The court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *accord Darden v. Wainright*, 477 U.S. 168, 186-187 (1986); *Hill v. United States*, 489 A.2d 1078, 1080 (D.C. 1985), *cert denied*, 476 U.S. 1119 (1986); *Zanders v. United States*, 678 A.2d 556, 569 (D.C. 1996). Moreover, "mere errors of judgment and tactical mistakes do not constitute deficiency, nor do mere disagreements with trial counsel's choices." *See Jenkins v. United States*, 870 A.2d 27, 34 (D.C. 2005) (defense counsel's withdrawal of his objection to the double-hearsay testimony of child victim's treating physician constituted trial strategy and did not amount to ineffective assistance of counsel); *Leftridge v. United States*, 780 A.2d 266, 272 (D.C. 2001) (mere fact that defense strategy had a potential drawback, or that an alternative strategy might reasonably have been selected does not mean counsel's performance was constitutionally deficient).

Further, even if counsel's representation was deficient, Mr. Roble must affirmatively prove prejudice that is "so serious as to deprive the defendant of a fair trial, a trial whose result is

reliable." *Strickland*, 466 U. S. at 687, 693. To meet this standard, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Hockman v. United States*, 517 A.2d 44, 51 (D.C. 1986) (quoting *Strickland, supra*, at 693-94); *Young v. United States*, 515 A.2d 1090, 1094 (D.C. 1986); *Townsend v. United States*, 512 A.2d 994, 1001 (D.C. 1986), *cert. denied*, 481 U.S. 1052 (1987).

Failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim. *Strickland*, 466 U.S. at 700. Consequently, the reviewing court need not even "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. Specifically, the reviewing court need not consider the issue of an attorney's performance if there is a finding that the defendant has not shown prejudice. *Id.* ("If it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."); *see also United States v. Frost*, 502 A.2d 462, 464 (D.C. 1985), *cert. denied*, 479 U.S. 836 (1986).

Here, Mr. Roble asserts a litany of complaints against his trial counsel,[3] which he claims either individually or collectively denied him effective assistance of counsel. In summary, he asserts that she:

1. Failed to communicate with Mr. Roble before and during trial;

2. Failed to move for a bench trial as Mr. Roble had requested;

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[3] Mr. Roble initially claims that his trial counsel, Ms. Walton, lacked trial experience with regard to serious cases. *Def.'s Mot.* at 7. However, since being admitted to practice in 2009, Ms. Walton had obtained substantial trial experience having tried nine jury trials with significant success. Moreover, as set forth below, she performed very well in this case – the result, however, was dictated by the overwhelming evidence of guilt, not the number of previous jury trials of his counsel.

He also claims that he was inexperienced with the "United States Justice System," and consequently was either befuddled by what was going on, or was intimidated into not speaking out concerning his counsel's failure during the proceedings. *Id.* The court observes that contrary to his assertions, Mr. Roble was very active throughout the proceedings, moving to withdraw his guilty plea after he entered it, raising oral and written concerns with his counsel throughout the proceedings, and filing *pro se* motions, including the instant motions to dismiss.

3. Failed to allow Mr. Roble to participate in jury selection;

4. Failed to properly advise Mr. Roble of his right to testify or prepare his testimony;

5. Failed to secure interpretation services for Mr. Roble;

6. Failed to adequately investigate, prepare and call Mr. Roble's exculpatory witnesses, SANE expert, or DNA expert;

7. Failed to object to the prosecution's prejudicial opening statements;

8. Failed to object to or seek to exclude pieces of evidence on chain of custody grounds or present any evidence of tampering of the evidence;

9. Failed to object to false government arguments;

10. Failed to cross-examine witnesses on important points or impeach the complainant with her prior inconsistent statements; and

11. Failed to present a theory consistent with Mr. Roble's plan of defense.

The court will address each of Mr. Roble's claims *ad seriatim*.

1. Failure to communicate with Mr. Roble before and during trial

Mr. Roble first argues that throughout the trial he was unable to communicate with his trial counsel and that he had a number of suggestions concerning arguments and potential cross-examination that she did not consider.

Throughout the trial, counsel was assisted by a law clerk who sat at counsel's table. Although Mr. Roble only now complains of this arrangement, he has not made a sufficient showing that this arrangement rendered his counsel ineffective. The court credits the testimony of Ms. Walton and defense investigator Mr. Steel that they consulted and communicated with Mr. Roble throughout the proceedings. According to Mr. Steel, he met with Mr. Roble 8-10 times, and Ms. Walton also met with him to review the evidence, discuss potential testing and results with the DNA expert, and conduct a mock cross-examination. In addition, the court

addresses the substance of cross-examination and arguments that Mr. Roble presently asserts he attempted to communicate to his counsel, in other sections of this order. Standing alone, however, the court is satisfied that Ms. Walton had extensive communication and consultation with Mr. Roble and was not ineffective in this regard.

2. Failure to move for a bench trial as Mr. Roble had requested

Mr. Roble next claims that trial counsel was ineffective for failing to request a bench trial as he directed. As evidenced by the testimony set forth by Mr. Roble, Ms. Walton and Mr. Steel on the matter, the decision to request a bench trial was the product of extensive dialogue amongst the defense team.

When Mr. Roble initially indicated that he wanted to be tried by a judge, Ms. Walton discussed the issue with the prosecutor and obtained the government's consent. According to Mr. Roble, part of this initial request was motivated by concern that the jury would likely not be made up of persons of a certain heritage. *Def.'s Mot.* at 13. After multiple discussions, some of which Mr. Steel attended, Mr. Roble agreed with counsel's assessment that a jury trial presented the better option and abandoned his preference for a bench trial. As a result, no such request was presented to the court.[4]

The court acknowledges how difficult this decision was for Mr. Roble, but is ultimately persuaded that Mr. Roble personally chose to be tried by a jury rather than a judge, consistent with the advice of his counsel. Furthermore, it was only after Mr. Roble's continued decision for a jury trial that counsel terminated her efforts to obtain a bench trial. Thus, while Mr. Roble may presently regret his forum selection, the court is not convinced that he did not make the decision to which Ms. Walton and Mr. Steel testified. Consequently, the court finds that Mr. Roble has

[4] During his testimony, Mr. Roble denied speaking about a bench trial with Ms. Walton when Mr. Steel was present. As to this conflict, the court credits the testimony of Mr. Steel, who, unlike Mr. Roble, appears to have no reason to fabricate with respect to this issue.

failed to demonstrate that his trial counsel was ineffective in the advice she provided him in this regard.

Accordingly, for these reasons and in recognition of the strength of the government's case, Mr. Roble's claim that counsel ineffectively failed to request a bench trial is unsupported and thus denied.

3. Failure to allow Mr. Roble to participate in jury selection

In Mr. Roble's third claim, he alleges that his trial counsel provided ineffective assistance by failing to allow him to participate in jury selection. At the evidentiary hearing, Mr. Roble testified that his counsel never explained the jury selection process, although he was provided with headphones and listened to the questioning of jurors.

For her part, Ms. Walton testified that she encouraged Mr. Roble's participation and conducted jury selection with his preferences in mind. First, Ms. Walton testified that before trial she and Mr. Roble discussed the process of jury selection in detail. To aid in Mr. Roble's understanding, she drew a diagram of the courtroom depicting the positions of the judge, counsel, court members, and Mr. Roble as each would appear during jury selection. She explained the content of various jury rosters and how the content of these rosters aided counsel in weeding out would-be jurors. In addition, Mr. Roble was provided with headphones to listen during individual *voir dire*, along with a note pad upon which to record his preferences.

During the course of jury selection, Ms. Walton discovered that Mr. Roble had become nervous, distracted, and eventually discontinued recording his preferences on the notepad. Despite Ms. Walton's attempts to remedy the problem and encourage Mr. Roble to try and keep pace with the jury selection process, Mr. Roble ultimately instructed her to complete the jury selection on her own.

Ms. Walton also testified that prior to jury selection, Mr. Roble provided her with very specific instructions regarding the jury's ultimate composition. Specifically, Mr. Roble

requested no Ethiopians or Hispanics, wanted to minimize the number of women on the jury, and found African Americans acceptable.[5] In the end, Mr. Roble expressed to Ms. Walton that he had no objections to any of the jurors.

In light of the testimony before it, the court concludes that trial counsel made a sincere and sustained effort to educate Mr. Roble about the jury selection process, and to take his views and preferences into account. The court credits trial counsel's testimony that at some point, and for whatever reason – the stress of the trial beginning, his own nervousness – Mr. Roble deferred the jury selection process to her, which she conducted consistent with his stated preferences. As a result, the court finds that Mr. Roble has not established that his trial counsel was ineffective in this regard.

4. Failure to properly advise Mr. Roble of his right to testify or prepare his testimony

Mr. Roble's fourth claim alleges that Ms. Walton was ineffective for having coerced him to waive his right to testify in his own behalf. *Def.'s Supp. Mot.* at 16. He argued that, because of his transfer to and from a Virginia jail in early March 2014, he had little access to Ms. Walton, who thereafter also failed to counsel him regarding his right to testify, belittled his prospective testimony, and insulted his family. Mr. Roble testified that, as a result, he concluded Ms. Walton would likely undermine his defense if he chose to testify.

In contrast, Ms. Walton testified that before trial Mr. Roble wavered on whether he would testify. She counseled him on his right to testify, but advised him not to testify because he had given multiple varying accounts of his interactions with Ms. Tiblets and Ms. Walton doubted whether he could ever remain consistent and could ever testify in a manner that would help his case. Further, Ms. Walton had another experienced attorney conduct a mock cross-examination

[5] The ultimate composition of the jury consisted of seven African Americans, one Asian, and six Caucasians. There were seven males and seven females on the jury – results not inconsistent with Mr. Roble's preferences.

of Mr. Roble to highlight the reasons why it was not in his best interest to testify, and after having done so, Mr. Roble agreed that he would not testify.

On April 2, 2014, the court personally addressed Mr. Roble in open court and advised him that: (1) he had an absolute right to testify or not testify; (2) the decision whether or not to testify was his alone; and (3) he should consult his counsel before making the decision about whether to testify. Thereafter, Mr. Roble personally addressed the court and confirmed that he had received enough time to consult with his counsel and had voluntarily chosen not to testify.

With respect to the substance of Mr. Roble's testimony, he testified at the post-conviction hearing that on the day of the assault he felt like socializing and called a couple of friends. He drank three to four cans of beer at home before he went out with his friend "Shaggy" (Sharmaake Muhammed). They went to Climax night club until it closed at 4:00 a.m., where Mr. Roble consumed additional drinks. He became intoxicated and believed he might have been drugged. After the club closed, Mr. Roble decided to go home and got into the vehicle Mr. Muhammed had borrowed, in which two Ethiopian males and an Ethiopian female also joined. Mr. Roble would later recognize the female to be Ms. Tiblets, whom he knew to be a waitress at the Sunshine Restaurant and had served him many times previously.

Mr. Muhammed told Mr. Roble that they were going to take the Ethiopians to the bar at the Sunshine Restaurant. Mr. Roble soon passed out because of the affects of the drink and did not speak to anyone in the car during the drive. When he awoke, he was the only one in the car, which was parked in a back alley parking space. His personal phone, a Blackberry, was ringing and he answered it as he was getting out of the car but then his work phone, a Motorola, fell and hit the ground. As he was exiting the car, Mr. Roble saw an Ethiopian man walking fast away

from Ms. Tiblets towards the after-hours place. Although it was very dark in the alley, Mr. Roble could tell that Ms. Tiblets was on her phone and appeared drunk.

As Mr. Roble was trying to get his phone from the ground, he saw two police vehicles come into the alley from Georgia Avenue at which time Officer Rimensnyder quickly told him to turn around and then handcuffed him. Mr. Roble tried to get his phone but the officer told him not to worry about it and placed Mr. Roble in the police car. As the police were handcuffing Mr. Roble, Ms. Tiblets started to walk fast in the direction of the after-hours club but Officer Rimensnyder stopped her. While in the police vehicle, Mr. Roble was able to call Mr. Muhammed, who came out from the after-hours club and moved his car out of the alley.

Due to his intoxication, Mr. Roble fell to the ground and injured his left hand and thumb, which was bleeding. He denied that he ever unzipped his pants or pulled out his penis and he denied ever assaulting, touching or choking Ms. Tiblets in any way. In order to explain his contradictory statements to the police, Mr. Roble testified that he was still intoxicated and possibly drugged during the police interrogation so he said a few things that were not true because the officers were confusing him and he was trying to protect other people. Although he admitted saying in the interview that he had hugged Ms. Tiblets, he later testified that he had said that before knowing that the allegations were about sexual assault, and not about public intoxication, in order to show the police that they knew each other and there was no problem.

As evidenced by a current version of events recounted by Mr. Roble – that he was drunk, his telephone happened to fall on the ground, he injured himself when he accidentally fell, he told the police the he had only "hugged" Ms. Tiblets because he was confused and trying to protect others – Mr. Roble attempted to provide an explanation for each piece of compelling

evidence against him. Further, at one point prior to trial, Mr. Roble provided his trial counsel with a different version of the events.

Assuming Mr. Roble would have provided the same testimony at trial, given the substance of his testimony and his demeanor while testifying, trial counsel's concerns about whether a jury would find his ever-shifting explanations to be credible were well-founded. Moreover, his testimony provides no rebuttal to the testimony of the officers who arrived at the scene and found him standing over Ms. Tiblets, the existence of the DNA evidence, and the testimony of the civilian witness who observed the attack as it was occurring. Trial counsel's concern that Mr. Roble's testimony would have been damaging to him was justifiable.

In light of the court's *Boyd*[6] inquiry, the extensive efforts taken by Ms. Walton in advising Mr. Roble and subjecting him to a mock cross-examination, and Ms. Walton's concern about him being cross-examined regarding his prior inconsistent statements, the court does not credit Mr. Roble's testimony that trial counsel failed to properly advise and, in effect, forced him not to testify. Given the jury's verdict, Mr. Roble may have regrets about not testifying; however, under the circumstances presented here, Ms. Walton provided Mr. Roble with competent advice and representation in making that decision. Mr. Roble's testimony to the contrary is simply not credible and thus the court denies this claim.

5. Failure to secure interpretation services

Mr. Roble asserts in his fifth claim that his trial counsel was ineffective for failing to obtain a Swahili interpreter for him during the trial. The court initially notes that throughout Mr. Roble's trial and post-conviction proceedings, he has been represented by three attorneys, entered a plea of guilty which he later withdrew, participated in an entire trial, and wrote several letters and *pro se* motions to the court, all without any assistance or request for an interpreter.

[6] *See Boyd v. United States*, 586 A.2d 670 (D.C. 1991).

Prior to July 24, 2015, neither Mr. Roble nor any of his counsel had ever requested an interpreter to aid him in his understanding of his sessions with counsel or the court. Throughout the proceedings, Mr. Roble never exhibited any difficulty in understanding the proceedings or communicating his concerns. This is not surprising given that he has been living in the United States since 2004, has obtained his GED certificate, and was working as a cable television installer for Comcast at the time of his arrest. After his arrest, Mr. Roble consistently told detectives and representatives from the Pretrial Services Agency and Court Services and Offender Supervision Agency that he had a high school education and a few college credits. His trial attorney also testified that she had no difficulty communicating with him and he appeared to have no difficulty understanding the proceedings so she saw no need for interpreter services.

It is true that a defendant has a constitutional right to an interpreter where his fluency in English is so impaired that it interferes with his right to confrontation or his capacity as a witness to understand or respond to questions. *See Ko v. United States*, 722 A.2d 830, 834 (D.C. 1998). Pursuant to the D.C. Interpreter Act, the court is obliged to appoint an interpreter whenever one is requested by a "communication-impaired" person. *See* D. C. Code § 31-2702(a). "Communication-impaired" means a person whose hearing is impaired or who does not speak English. *See* D. C. Code § 31-2701(2).

Mr. Roble first requested interpreter services before the evidentiary hearing on his post-conviction claims, which the court honored out of an abundance of caution and not because the court deemed it to be legally required. Notably, where a team of Somali interpreters provided interpretation to Mr. Roble during the hearing, Mr. Roble at one point corrected his interpreter's English translation of his given answer and at other times eschewed the use of interpreters. From the court's observations, Mr. Roble understood the proceedings and the questions asked of him,

often not waiting for an interpretation before answering questions. Although Mr. Roble tended to use the interpreter's services during cross examination, thus giving him time to formulate his answer, the court finds this to be a strategic choice rather than evidence of a language barrier.

Throughout the entire proceedings – arrest, custodial interrogation, presentment, status hearings, complaints about counsel, entry and withdrawal of a guilty plea, trial proceedings including a *Boyd* inquiry, initial post-conviction submissions and extensive written communications and written *pro se* motions – Mr. Roble has exhibited no difficulty in understanding, speaking and writing English. It was not until later on in his post-conviction proceedings that Mr. Roble first asserted that he had difficulty understanding English.

Based on the evidence before it, the court concludes that Mr. Roble's assertion that he has difficulty understanding English is a strategic attempt to undermine his conviction, and not a legitimate assertion of his right to interpretive services. As a result, the court finds trial counsel's performance in this matter neither constitutionally deficient nor prejudicial.

6. Failure to adequately investigate, prepare and call Mr. Roble's exculpatory witnesses, SANE expert, or DNA expert

In his sixth claim, Mr. Roble argues that trial counsel was ineffective for failing to investigate and present exculpatory eyewitnesses at trial. Specifically, he listed "Sharmake Muhammed, Soloman Yazga [SP], Adam Abraham, and Sam (Yenenh) Hailu" as exculpatory eyewitnesses whom trial counsel should have investigated and presented, along with an unspecified SANE Nurse and DNA expert.

As an initial matter, the court observes that it is undisputed that none of the witnesses, Sharmake Muhammed, Soloman Yegzaw, Adam Abraham, or Yenenh Hailu, was present in the alley when Ms. Tiblets was sexually assaulted. Nevertheless, Mr. Roble argues that the testimony of Sharmake Muhammed, Solomon Yegzaw, Adam Abraham, Yenenh Hailu, and the

unidentified SANE nurse would have impeached Ms. Tiblets' testimony about facts occurring before the assault, or would otherwise have undermined her credibility as a witness. Yenenh Hailu was the only witness to testify at the evidentiary hearing, and Mr. Roble has not provided any affidavit or declaration[7] from any of the other remaining witnesses.[8]

a. Civilian witnesses

During the evidentiary hearing, Yenenh Hailu testified that Ms. Tiblets, a waitress at Hailu's hookah bar, the Sunshine Club, had served Mr. Roble on multiple occasions. Ultimately, Mr. Hailu fired Ms. Tiblets after she had multiple verbal confrontations with flirtatious customers; allegedly misrecorded a customer's liquor purchase; claimed that one of his best customer's had made untoward advances while escorting her home but refused to report the matter to authorities when Mr. Hailu challenged her to do so; had been suspected of failing to contribute her fair share (10%) of her tips to a bus boy; and had publicly rebuked Mr. Hailu for openly supporting the bus boy in this dispute and consequently refused to return to work thereafter. Mr. Hailu further claimed that after Mr. Roble's conviction and sentence, he spoke to

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[7] Generally, defendants are obliged to provide an affidavit, declaration, or other credible proffer from each of the named "exculpatory eyewitnesses"; and Mr. Roble's failure to do so, in itself, was a sufficient ground to reject without a hearing his allegations of ineffectiveness based on counsel's alleged failure to investigate and present these particular witnesses. *See Ransom v. United States*, 947 A.2d 1127, 1131 (D.C. 2008); *Ready v. United States*, 620 A.2d 233, 234 (D.C. 1993) (evidentiary hearing not required prior to summary denial of defendant's ineffective assistance of counsel claim where defendant failed to provide substance of alleged witness's prospective testimony).

[8] Because the testimony of other witnesses was not presented, the substance of their testimony is at best speculative, despite Mr. Roble's musing about what they might have said. For example, Mr. Roble suggests that Sharmaake Muhammed and Adam Abraham would have testified at trial to impeach the complainant's multiple stories, including that: (1) the cab that Mr. Muhammed drove and transported him, the complainant, and the other witness was parked in the alley close to the black SUV, and not on Georgia Avenue; (2) they had driven to the alley at the suggestion of Ms. Tiblets and her dealings with the after-hours club rather than at the insistence of anyone else; (3) Mr. Roble was intoxicated and semi-unconscious during the cab ride, not sober; and (4) Ms. Tiblets' clothes after the alleged incident were in clean condition rather than, as the complainant suggested, dirty from Mr. Roble having dragged her across the ground. Likewise, Mr. Roble suggests that Soloman Yazga would also have testified regarding Mr. Roble's level of intoxication.

By contrast, Mr. Steel attempted to contact Mr. Muhammed based on the name and telephone number provided by Mr. Roble. Despite extensive efforts, Mr. Muhammed was never located. And, Mr. Roble has presented no credible evidence that any of these witnesses would have testified as he suggests they would have.

Ms. Tiblets about the case and she denied that he had "raped" her, claiming that he had been too drunk to do so.

Even accepting Mr. Hailu's testimony to be true, the court observes that much of his testimony focused on what can best be described as "collateral" matters, e.g., not central to the allegations in this case or based on hearsay, and would not have been exculpatory at trial. For example, Mr. Hailu testified about an incident between Ms. Tiblets and another customer who provided her a ride home one night, where Ms. Tiblets told Mr. Hailu that the customer attempted to assault her and would not allow her to leave his car. When Mr. Hailu advised her to contact the authorities, Ms. Tiblets declined, stating that the matter was not that serious. Here, even if Mr. Hailu had been available at trial, such testimony would not have been admissible given that there was no evidence that Ms. Tiblets' account was untrue – only that she decided not to report the incident. *See Roundtree v. United States*, 581 A.2d 315 (D.C. 1990).

With respect to his testimony regarding interactions between Mr. Roble and Ms. Tiblets at the restaurant, while this testimony may have provided the jury with more reason to credit her version about why she was comfortable accompanying Mr. Roble and others to an after-hours party, it does not undermine Ms. Tiblets' testimony about what happened in the alley. The same analysis can be extended to Mr. Hailu's testimony regarding Ms. Tiblets' work performance and dispute. Finally, Ms. Tiblets' purported statements that Mr. Roble did not "rape" her because he was too drunk tend to corroborate rather than undermine her testimony; specifically, she did not deny the assault, but only that he was too drunk to consummate the act and ended up penetrating her with his fingers. These facts are consistent with Ms. Tiblets' version.

Notably, Mr. Hailu did not make himself available to testify for the defense.[9] Yet even if he had testified, the government could have brought out on cross-examination Mr. Hailu's bias in favor of Mr. Roble, who called Mr. Hailu after his arrest and asked him to "speak" to Ms. Tiblets. Consequently, the court finds that trial counsel was not ineffective in failing to present Mr. Hailu's testimony at trial because most of it was irrelevant or would have been inadmissible either as hearsay or collateral and to the extent the testimony was relevant, it was not constitutionally prejudicial.

b. DNA expert

Mr. Roble claims that his trial counsel was ineffective for failing to present DNA expert Dr. Noureddine's testimony at trial. Ms. Walton testified that, before trial she identified Dr. Noureddine as a respected DNA expert and prospective defense witness. She enlisted Dr. Noureddine's expert assistance before and during trial to: (1) observe the Department of Forensic Science (DFS) testing; (2) interpret DFS testing results; (3) determine whether further DNA or forensic testing was necessary; (4) conduct independent testing; (5) interpret the results of the independent testing; (6) observe the testimony of government expert-witnesses; (7) provide substantive insight on how to cross-examine the government's expert witnesses; and (8) prepare as a potential expert rebuttal witness.

At Ms. Walton's request, Dr. Noureddine observed the government's DNA testing and met with Ms. Walton and Mr. Roble to review the testing and results. He advised that no additional testing be conducted. Although all three were in apparent agreement that the defense would not request additional testing, Mr. Roble eschewed that advice – without apparent notice to Ms. Walton – and announced during the IPA hearing that he wanted independent DNA tests to be conducted. As a result, independent testing was conducted by Dr. Noureddine. The results of

[9] Mr. Hailu had spoken with the defense investigator early on in the case and his mother accepted a subpoena on his behalf, yet at the time of trial he was in "Baltimore" with no contact to the defense team about his availability.

this testing confirmed the DFS' test results, which refuted Mr. Roble's persistent denials that the white tank top t-shirt was his. In light of these results, Dr. Noureddine advised Ms. Walton that Mr. Roble's case was forensically "beyond help" and that he could not testify without potentially exposing the damning results of his independent testing.

Based on Dr. Noureddine's independent test results and expert opinion, Ms. Walton concluded that it was not in Mr. Roble's best interest to present Dr. Noureddine as a defense expert. Ms. Walton advised Mr. Roble of her decision not to present Dr. Noureddine, and he agreed with this decision. Nevertheless, counsel retained Dr. Noureddine as a potential witness and to assist her with cross-examination of the government's DNA expert.

At the post-conviction hearing, Dr. Noureddine testified that he disagreed in part with the government expert's conclusion that semen could be identified on the swab of Ms. Tiblets' external genital. In his opinion, the analyst should have deemed the result as inconclusive for the presence of semen for the following reasons: (1) the acid phosphatase test that was undertaken is only a presumptive test for semen because the enzyme can be found in other biological samples; (2) the analyst's indication of a weak positive indication for the P30 test could have come from the low level of the P30 protein also found in women; (3) the analyst's notation of a negative presence of spermatozoa; and (4) the analyst's notation of no male DNA identified.

With regard to the blood evidence, Dr. Noureddine disagreed that blood could be identified on the white tank top t-shirt. He concluded that the analyst had incorrectly assumed the presence of blood based upon a positive result of the phenol saline test, along with the presence of human DNA because: (1) the phenol saline test is a presumptive test for blood as it can give false positive reactions and (2) DNA testing cannot confirm the type of biological fluid.

It is well settled that a trial attorney has the authority to make all strategic and tactical decisions, other than the decisions as to which plea to enter, whether to waive a jury trial, and

whether the defendant will testify. *See Kuhn*, 900 A.2d at 700 (D.C. 2006). "In any given case, there may be a wide range of reasonable professional assistance, and trial counsel therefore must be given sufficient latitude to make tactical decisions and strategic judgments which involve the exercise of professional abilities. Strategic choices made after a thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 698. Moreover, the mere fact that a particular defense strategy may have had a potential drawback, or that an alternative strategy might reasonably have been selected does not equate to constitutionally deficient performance. *See Leftridge*, 780 A.2d at 272.

Given the results of Dr. Noureddine's independent testing, obtained only because Mr. Roble elected against trial counsel and expert's recommendations, the court finds that counsel's decision to refrain from presenting Dr. Noureddine's testimony was a reasonable tactical decision which she made after exhaustive consultations with Dr. Noureddine and Mr. Roble. There was an overwhelming shortcoming to Dr. Noureddine's trial testimony, given that he would have confirmed the government's DNA results, and thus any competent counsel would have made the same decision.[10] While Dr. Noureddine's testimony at the post-conviction

[10] Mr. Roble also asserts that, after trial, DFS came under fire for inappropriate interpretations of DNA mixture evidence. In late 2014, the government had retained a panel of experts to perform a review of cases in which DFS had issued a DNA report with statistical calculations. The panel issued its final report on April 22, 2015. *See* Def.'s Ex. 122, BRUCE BODOWLE & FREDERICK R. BIEBER, FINAL REPORT ON REVIEW OF MIXTURE INTERPRETATION IN SELECTED CASEWORK OF THE DNA SECTION OF THE FORENSIC SCIENCE LABORATORY DIVISION (FSL), DEPARTMENT OF FORENSIC SCIENCES (DFS), DISTRICT OF COLUMBIA (2015) (hereafter "FINAL REPORT"). The report concluded that DFS's practices related to DNA mixture interpretation were not within the range of generally acceptable practices. FINAL REPORT at 2. The problems identified by the Panel included the inappropriate use of statistics in mixtures by inclusion of loci where allele drop out was highly probable and not using established stochastic thresholds to assess potential allele drop out. *Id.* Specifically, in relation to Mr. Roble's case, the Panel concluded that DFS did not take into account allelic dropout that had to have occurred in at least one loci, and possibly others, if the sample was truly taken from Mr. Roble. Therefore, DFS misstated the portion of the population that could contribute to the mixture. Furthermore, the Panel concluded that DFS misapplied the concept of a CPI by calculating two CPIs.

Dr. Noureddine reviewed the FINAL REPORT and agreed with the determinations cited therein. Specifically, with regard to a swab from the back of the left hand of Mr. Roble, Dr. Noureddine noted that the DFS analyst calculated two different mixture statistics on the same sample. Dr. Noureddine testified that not only was it not the best practice as determined by the FINAL REPORT, but that it was not a good practice generally. Dr. Noureddine further testified consistent with the FINAL REPORT that, due to the analyst not seeing all of Mr.

hearing may have theoretically undermined some of the government expert's preliminary opinions, this testimony would not be able to undermine the primary DNA results presented at trial because Dr. Noureddine's independent testing essentially confirmed the government's results. Therefore, trial counsel's decision as to whether to present the testimony of Dr. Noureddine was a classic tactical decision, which was reasonable under the circumstances and one which the court is not in a position to second guess.

c. SANE expert

Finally, Mr. Roble complains that his trial counsel neither retained nor consulted with her own SANE nurse or medical doctor, who could have rebutted the SANE nurse's and Dr. Rotolo's testimony regarding Ms. Tiblets' exam and injuries. However, Mr. Roble has not provided any evidence as to what, if anything, the medical expert would have testified to at trial. Instead, Mr. Roble makes various assertions that trial counsel could have conducted additional cross-examination of Ms. Tiblets, using medical records and a CT scan obtained after her initial SANE exam, to show that several weeks after the incident she exhibited no acute distress, her neck was not tender and there were no signs of external injuries. According to Mr. Roble, these facts would have rebutted Ms. Tiblets' testimony regarding the state of her injuries even at the time of trial in 2014.

First, Mr. Roble has presented no evidence that any of these purported medical facts was inconsistent with Ms. Tiblets' testimony regarding the nature of her injuries. Next, Ms. Tiblets was thoroughly cross-examined at trial and trial counsel significantly challenged her credibility

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Roble's DNA on an "intimate" sample which established at least allelic dropout in the one locus, it may have resulted in possible allelic dropout in other loci of the profile. Dr. Noureddine noted that the FINAL REPORT showed that DFS's statistical calculations of mixed samples were shown over and over to be problematic in several cases besides Mr. Roble's case and not in best practice of the scientific community.

While in an academic sense the weaknesses cited in the FINAL REPORT issued after trial, and Dr. Noureddine's opinions may have been something for counsel to consider, after Dr. Noureddine completed his independent testing and confirmed the government's results, counsel would have been left with the same, difficult, tactical decision, and there is no evidence that the decision would have been – or should have been – different.

from opening statements to closing arguments. At best, the examination demonstrates that Ms. Tiblets' injuries or pain had abated at that time, but it does not preclude exacerbation of her pain at a later date. Accordingly, the court finds that Mr. Roble has failed to demonstrate either that his trial counsel was ineffective or that he suffered sufficient prejudice.

7. Failure to object to the prosecution's prejudicial opening statements

Mr. Roble claims that he is entitled to a new trial because Ms. Walton failed to object to the government's opening statement in which the prosecutor alluded to Mr. Roble's state of mind:

> What he saw was an opportunity to violate a woman's most personal and intimate part of her body as he tried to force his penis inside of her and then his fingers, and it was because Mohammed Roble assumed he was entitled to do that.
>
> It was because Mohammed Roble assumed that he could get away with it and that this woman struggling beneath him would just be quiet and submit. . . . [T]here is no doubt that Mr. Roble assaulted and raped a woman he saw as weak, who he saw as vulnerable, who he saw as an object that he could degrade, abuse[,] and violate with no consequence.

(3/31/2014 Tr. 4-13).

It is well settled that the purpose of an opening statement is to give a broad outline of the case to enable the jury to comprehend it, and thus the statement should not be argumentative, inflammatory, or appeal to the passions of the jury. *Bailey v. United States*, 831 A.2d 973, 981 (D.C. 2003) (citations omitted). As cautioned by the Court of Appeals:

> We have stated that "an opening statement consisting of an objective summary of evidence which the prosecution reasonably expected to introduce, although at variance with the evidence actually introduced at trial, need not be cause for reversal." *Augburn v. United States*, 514 A.2d 452, 454 (D.C. 1986) (internal citations and quotation marks omitted). "[T]he law does not require that opening trial statements be completely supported by evidence introduced during the trial. Such a rule, rigidly enforced, would effectively eliminate opening remarks and deprive the jury of a very useful outline of the trial." *Owens v. United States*, 497 A.2d 1086, 1091 (D.C. 1985) (quoting *Robinson v. United States*, 361 A.2d 199, 200 (D.C. 1976)). "[T]he failure to sustain all opening remarks during the trial is not automatically ground for a new trial. The decision is

discretionary and is for the trial judge." *Robinson*, 361 A.2d at 200 (quoting *Mares v. United States*, 409 F.2d 1083, 1085 (10th Cir. 1968)).

Evans v. United States, 12 A.3d 1, 7 (D.C. 2011).

One of the elements of first-degree sexual abuse is that Mr. Roble assaulted Ms. Tiblets "with intent to abuse, humiliate, harass, or degrade Ms. Tiblets or to gratify his own sexual desire." Arguably, the passing reference by the prosecution in a much longer opening statement, was not so outside the bounds of what reasonably could have been presented at trial so as to make the statements obviously objectionable. Nevertheless, even if trial counsel could have objected to some of the prosecutor's statements on this basis, Ms. Walton explained that she did not object to the government's opening argument because she anticipated that some of her opening argument could also be objectionable, and she further believed that by her not objecting she increased the likelihood (1) that the government would not object to her opening and (2) of not alienating the jury. Such a tactical decision appears to be within the realm of decisions that are left to competent trial counsel – numerous technical objections can be made during a trial, but it is left with counsel to decide when such an objection will be strategically advantageous given the circumstances and whether the government will respond in kind.

Moreover, the court specifically instructed the jury both before counsel's opening comments that "opening statements are not evidence in the case," and after the presentation of evidence, that it was the jury's function to determine what the facts are in the case, to consider only the evidence properly admitted at trial, and that it was the jury's recollection of the evidence that should control their deliberations. *United States v. Olano*, 507 U.S. 725, 740 (1993) (courts should presume that jury follows court's instructions).

For this and the reasons set forth below on the lack of prejudice, counsel's failure to object to these statements did not constitute ineffective assistance of counsel.

8. Failure to object to or seek to exclude pieces of evidence on chain of custody grounds or present any evidence of tampering of the evidence

Mr. Roble claims that his trial counsel was ineffective for failing to suppress Government Exhibit 48, a white tank top t-shirt allegedly worn by Mr. Roble and seized upon his arrest that contained a corresponding stain of Ms. Tiblets' DNA. *Def.'s Mot.* at 2. He asserts that counsel could have suppressed this evidence by alleging evidence tampering and exposing flaws in the chain of custody.

It is well settled that counsel has no professional obligation to object to the admission of evidence or to file a motion to suppress evidence unless the objection or motion would have been successful. *See Kimmelman v. Morrison*, 477 U.S. 365, 382-83 (1986) (meritorious 4th Amendment issue is a prerequisite for a successful ineffective assistance of counsel claim based on counsel's failure to suppress evidence); *Washington v. United States*, 689 A.2d 568, 571 (D.C. 1997) (counsel owes no professional obligation to file a meritless motion to suppress evidence); *Taylor v. United States*, 603 A.2d 451, 459 (D.C. 1992) (counsel have no professional obligation to file a motion to suppress identification evidence, unless the motion, if filed, would have been successful). Moreover, counsel has an ethical obligation to be candid with the court. *See* D.C. Bar Rule 3.3.

The white tank top t-shirt that Mr. Roble claims should have been suppressed was collected by MPD Forensic Technician James Savage in the presence of Detective Alexander Mac Bean on the morning of April 13, 2013 at the Third District police station incident to his arrest. This t-shirt was later identified by Officer Savage at trial and then admitted into evidence. Mr. Roble claims that he had informed Ms. Walton before trial that be believed the white tank top t-shirt was either planted or fabricated, based on a number of factors including: (1) a copy of the crime scene search officer's list of evidence with no signature on the report; (2) the t-shirt was not listed in Detective MacBean's notes reflecting clothing that the police had recovered

from him after his arrest; (3) there were no photographs depicting Mr. Roble in a white tank top t-shirt; and (4) Mr. Roble's DNA was never discovered on the white tank top t-shirt. He further argues that, because Detective MacBean testified in the preliminary hearing that no stain was visible on the shirt and because Mr. Roble noted no stains on the shirt in the photos taken by his investigator before trial, his counsel should have moved to suppress this evidence when the shirt presented at trial had visible stains.[11]

On their face, these claims concern the weight afforded the evidence and not its admissibility. *See Brooks v. United States*, 993 A.2d 1090, 1094 (D.C. 2010) (gaps in chain of custody are relevant to the weight given to evidence not its admissibility, as there is a presumption that evidence in the hands of the government was handled properly*); Fleming v. United States*, 923 A.2d 830, 836-37 (D.C. 2007) (same). Moreover, Ms. Walton testified that she did not move to suppress the evidence because there was no legitimate basis to suppress it – a fact borne out by the record. Although Ms. Walton was aware of a possible theory of tampering, with evidence in support thereof, and could have cross-examined on the issue, she testified that she "found no basis" in which to file such a motion given that the independent DNA test conducted by defense's own DNA expert refuted Mr. Roble's claim that the white, tank-top t-shirt was not his.

Because Mr. Roble has failed to demonstrate that the proposed motion or objection, if made, would have been successful and would have ultimately undermined this court's confidence in the outcome of the case, his claim of ineffective assistance of counsel is legally unsupported and warrants no relief.

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[11] In support of his tampering claim, Mr. Roble also alleges that: (1) his DNA was not found on his own supposed intimate samples; (2) the complainant's biological evidence (rape kit) was collected by an independent source at the Washington Hospital Center and sent immediately to the forensic crime lab for analysis and none of Mr. Roble's DNA was found while the defendant's biological evidence collected by police officers was held in police custody for six months along with duplicate samples from the complainant before submitting to laboratory; and (3) the brown evidence bags containing the penile, finger and hand DNA swabs did not have Mr. Roble's name on it but instead had the name Suleiman, the defendant's middle name, which was different from other bags of evidence collected.

9. Failure to object to false government arguments

Mr. Roble also claims that his trial counsel was ineffective for failing to object to Ms. Tiblets' false statement that she had apologized to the grand jury for previously testifying falsely, a fact known to be untrue by both Ms. Walton and the government and yet was reiterated by the prosecutor in her closing arguments; by doing so, the prosecutor committed misconduct that so infected the trial with unfairness it made Mr. Roble's conviction a denial of due process.

It is true that a prosecutor's argument that constitutes a clear misstatement of the evidence is misconduct. *See Lewis v. United States*, 541 A.2d 145, 147 (D.C. 1988); *see also Jones v. United States*, 512 A.2d 253, 258 (D.C. 1986). The prosecution's duty of candor extends to facts not just in the record but known to the government. *Woodard*, 56 A.3d at 128 (citing *Powell v. United States*, 880 A.2d 248, 258 n.23 (D.C. 2005) (stating that prosecutors must "guard against inviting inferences of fact arguably contrary to evidence of which they are aware")).

In this case, Ms. Tiblets testified before the jury that she had made untruthful statements in her first appearance before the grand jury by not mentioning that she was bringing individuals to an after-hours party, for which she then apologized to the trial jury. Whether she had already apologized to the grand jury was insignificant in terms of the overall merits of the case. Ms. Tiblets' act of making an untruthful statement and how it affected her credibility was fully presented and argued to the jury. Because the court finds that the jury had all the information necessary to determine whether Ms. Tiblets was credible, Mr. Roble is not entitled to relief on this claim.

10. Failure to cross-examine witnesses on important points or impeach the complainant with her prior inconsistent statements

Mr. Roble claims that his trial counsel was ineffective for failing to "effectively use all of the victim's contradictory statements made to detectives, the SANE nurse, or [during her] grand

jury testimony." *Def.'s Mot.* at 13. The court is mindful that evaluation of counsel's performance must be deferential in some respects:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it's all too easy for a court, examining counsel's defense, after it has been proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. (citation omitted). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance . . . . There are countless ways to provide effective assistance in any case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. . . . An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of the criminal proceeding if the error had no effect on the judgment.

Strickland, 466 U.S. at 689-91.

Although Mr. Roble's supplementary pleadings trace a host of other ways that Ms. Walton could have impeached Ms. Tiblets, a review of the record demonstrates that trial counsel vigorously cross-examined Ms. Tiblets and impeached her with multiple inconsistencies. Specifically, counsel impeached Ms. Tiblets' claims that (1) she was employed at the Mercato Restaurant with the contrary testimony of the restaurant owner; (2) she went along with Tekle and others to the after-hours location because Mr. Tekle was sad and insisted he needed to talk to someone, a fact he denied; and (3) Mr. Tekle had signaled her multiple times in the cab not to return home with the same cab driver with Mr. Tekle's testimony to the contrary. Further, counsel established that Ms. Tiblets was an illegal alien and was scared when the police arrived; when she initially spoke to the police and SANE nurse, she did not say anything about the after-hours club; and that she had given the grand jury two different versions of the events about what

she was doing with the men before the assault. In the end, these inconsistencies were insufficient to undermine the jury's confidence in Ms. Tiblets' credibility because of the other compelling corroborating evidence.

As with most post hoc analysis of any trial, Mr. Roble's post-conviction motion attempts to second guess the manner in which trial counsel impeached Ms. Tiblets. Notably, the post-conviction process of sifting through a witness's testimony in order to identify inconsistencies or discrepancies and then determine which, if any, details should be emphasized is markedly different when one is in trial and listening to the testimony first-hand versus reviewing a transcript of it after the fact. As a result, because of counsel's extensive and effective cross-examination of Ms. Tiblets, the court is persuaded that counsel's efforts were sufficient to put the government's evidence to the test, in a case where the evidence of Mr. Roble's guilt was overwhelming, as hereafter described. Accordingly, the claim of ineffective assistance of counsel warrants no relief.

11. Failure to present a theory consistent with Mr. Roble's plan of defense

Mr. Roble also argues that his trial counsel failed to present a consistent theory of fabrication and instead presented a contradictory theory of consent by asking a couple of minor, rhetorical questions within her closing. He complains that Ms. Walton did so even though there had been no evidence presented of consent and Mr. Roble had not wanted to present a consent theory. However, Mr. Roble's claim is misguided. The rhetorical questions posed by Ms. Walton during her closing argument were clearly stated with the intent to cast doubt on Ms. Tiblets' actions in the event the jury credited her testimony that Mr. Roble engaged in sexual acts with her. Counsel never explicitly argued or suggested to the jury that it should acquit Mr. Roble

because the acts between him and Ms. Tiblets were consensual. As such, this claim does not warrant any relief.

Ruling on Motion for Judgment of Acquittal and Lack of Prejudice

Mr. Roble's final claim alleges that the evidence was insufficient to support his convictions.

Post-conviction challenges to the sufficiency of evidence are viewed in the light most favorable to the government, giving full play to the right of the trier of fact to determine the creditability, weigh the evidence, and draw justifiable inferences of fact. *See In re D.E.*, 991 A. 2d 1205, 1211 (D.C. 2010). "It is only where the government has produced no evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt that this court can reverse a conviction." *Nixon v. United States*, 730 A.2d 145, 148 (D.C. 1999) (citations omitted).

In order to support his conviction for kidnapping, the government had to present evidence to show that Mr. Roble: (1) purposely and intentionally seized or confined Ms. Tiblets against her will; and (2) did so voluntarily for purpose of assaulting her. *See Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005).

As recounted above, the record shows that after Ms. Tiblets took several men to the back door of the after-hours club, she left the men and began walking alone through the alley toward Georgia Avenue in search of a cab. However, she never had the opportunity to hail the cab because Mr. Roble ran toward her, grabbed her by her arms, and pulled her deep into the shadows of the deserted alley. When she shouted for help, he suffocated her screams, wrapped his hands around her neck, and threw her to the ground. He then picked her up and dragged her toward the rear of the alley next to a dark SUV where he sexually assaulted her. This evidence, when viewed in the light most favorable to the government, was more than sufficient to support Mr. Roble's conviction for kidnapping.

In order to support Mr. Roble's conviction for first-degree sexual abuse, the government had to present evidence that he: (1) engaged in a sexual act with Ms. Tiblets without her consent, *i.e.*, penetrated her vulva with his fingers; (2) by force; and (3) with intent to abuse, humiliate, harass, or degrade Ms. Tiblets or to gratify his own sexual desire. *See Hicks v. United States*, 707 A.2d 1301, 1303-1304 (D.C. 1998).

In order to support Mr. Roble's conviction for assault with the intent to commit first-degree sexual abuse, the government had to present evidence that he: (1) intentionally and by force injured or attempted to injure Ms. Tiblets; and (2) voluntarily did so with the intent to penetrate her vulva with his penis. *See* D.C. Code § 22-401.

In order to support the conviction for attempted first-degree sexual assault, the government had to present evidence that Mr. Roble: (1) intended to commit the act of first-degree sexual abuse, *i.e.*, penetrate Ms. Tiblets' vulva with his penis; and (2) did some act reasonably adapted to accomplishing that intent. *See In re D.W.*, 989 A.2d 196, 208 (D.C. 2010).

Here, Ms. Tiblets testified that after Mr. Roble pulled her deep into the alley and wrestled her to the ground, he opened her pants and pulled them down to her thighs and attempted to force his penis inside of her vagina. However, when his non-erect penis made success in his design difficult, Mr. Roble forced his fingers inside Ms. Tiblets' vagina multiple times instead. Ms. Tiblets testified that she was menstruating at the time, and her blood and DNA was later detected on the interior of Mr. Roble's white t-shirt. This evidence, when viewed in the light most favorable to the government, was more than sufficient to support Mr. Roble's conviction for first-degree sexual abuse, assault with the intent to commit first-degree sexual abuse, and attempted first-degree sexual abuse.

Ms. Tiblets' claim of sexual assault was also supported by a disinterested witness, Daniel Diaz, who recounted hearing female screams in the alley below his residence and seeing a dark

brown-skinned man of slim build, wearing a black and white shirt and black pants, hovering over top of a woman. These observations and sounds prompted him to call 911 and to report a rape in progress to which Officers Pacheco and Rimensnyder responded to the scene. Once there, Officer Pacheco heard a woman scream, and when she looked in the direction of the scream she saw Mr. Roble on his knees with his back toward Officer Pacheco, hovering over top of Ms. Tiblets, who was lying on her back on the ground. SANE Nurse Stacia Shryock testified that, during her sexual assault exam of Ms. Tiblets, she observed visible scratches and bruises to the right side of Ms. Tiblets' neck, nose, hands, arm, buttocks, back and interior vaginal region. Forensic analysis of the white tank top t-shirt seized from Mr. Roble after his arrest also revealed a stain on the inside lower front of the shirt, which tested presumptively positive for blood while yielding a DNA profile that matched the DNA profile obtained from the known blood sample of Ms. Tiblets.

In light of all the testimony and physical evidence presented, in addition to the persuasive testimony of Ms. Tiblets, the evidence of Mr. Roble's guilt was overwhelming – literally Mr. Roble was observed committing the crime by a disinterested witness, caught in the middle of the act by the police, and identified as the perpetrator by DNA evidence.

As set forth above, in order to obtain relief because of his counsel's unconstitutional ineffectiveness, Mr. Roble must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Hockman v. United States*, 517 A.2d 44, 51 (D.C. 1986) (quoting *Strickland,* 466 U.S. at 693-94); *Young v. United States*, 515 A.2d 1090, 1094 (D.C. 1986); *Townsend v. United States*, 512 A.2d 994, 1001 (D.C. 1986), *cert. denied*, 481 U.S. 1052 (1987). Mr. Roble has not come close to making the requisite showing.

The court has addressed the major complaints raised by Mr. Roble, and finds any remaining complaints to be relatively minor and do not arise to ineffective assistance of counsel or warrant relief.[12] Regardless, the court is confident that taken individually or collectively, Mr. Roble's claims and the evidence supporting them are insufficient to establish that there is a reasonable probability that the outcome of his trial would have been different. While Mr. Roble has scoured the transcript and pointed to every conceivable mistake made by his trial counsel and the government, the fact remains that he has presented no evidence and points to no error that undermines the court's confidence in the conviction. The evidence of guilt is overwhelming and therefore he has failed to establish sufficient prejudice to warrant relief.

Wherefore, for the reasons stated, it is this 11th day of April, 2016, hereby

ORDERED, that Mr. Roble's Motion for New Trial or, in the alternative, Judgment of Acquittal, pursuant to Superior Court Criminal Rules 29 and 33 and D.C. Code § 23-110 is hereby DENIED.

Judge Robert E. Morin

[12] For example, Mr. Roble persists in alleging prosecutorial misconduct in the form of: (1) admitting and misrepresenting Gov't Trial Ex. 9, an alleged photo of his black pants, as a post-assault photo of Ms. Tiblets' black pants; and (2) admitting and misrepresenting Gov't Trial Exhibit 7a and b, photos of his cell phone, as photos of Ms. Tiblets' cell phone. These claims are also belied by the existing record. Contrary to his claim, Gov't Trial Ex. 9 depicted Ms. Tiblets' black pants – not his – as evidenced from the fact that Ms. Tiblets' other post-assault photos depict her while wearing black, low cut, leather shoes. *See* Gov't Trial Ex. 12; Gov't 23-110 Ex. 11. Moreover, Gov't Trial Ex. 9, a faceless photo of an individual's legs and feet depict an individual wearing black pants and a petite pair of black, low cut leather shoes while standing outside. Mr. Roble's clothing was first photographed and seized inside the Third District Police station after his arrest. Although the police failed to capture a photo of his shoes, an evidence document recording the seizure reflects that Mr. Roble when arrested was wearing a pair of size 11M, Timberland brown boots. *See* Gov't 23-110 Ex. 2. Moreover, Officer Savage at trial authenticated Gov't Exhibits 7a and b (photos of a cell phone found on the ground at the crime scene) before they were admitted. These photos, however, were never used during the examination of Ms. Tiblets and thus she never claimed that the Motorola cell phone depicted in these photos was hers. As a result, the government never misrepresented its significance during argument.

cc:

Kevin Irving, Bar # 482843
419 7th Street, NW
Suite 405
Washington, DC 20004
Counsel for Defendant

Timothy W. Lucas
Office of the United States Attorney
Special Proceedings Division
555 Fourth Street, NW
Washington, DC 20530

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 14-CF-668, 15-CO-376, and 16-CO-351

MOHAMMED SULEIMAN ROBLE, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeals from the Superior Court
of the District of Columbia
(CF1-6095-13)

EXHIBIT B

(Hon. Robert E. Morin, Trial Judge)

(Argued January 9, 2018 Decided August 21, 2018)

Before THOMPSON and MCLEESE, *Associate Judges*, and WASHINGTON, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Mohammed Suleiman Roble challenges convictions arising from an incident in which he was found guilty of kidnapping and sexually assaulting the complainant, G.T. We affirm, except that we remand for the trial court to vacate one conviction on merger grounds.

I.

The evidence presented at trial included the following. At about 2:30 a.m. on April 13, 2012, G.T. came across an acquaintance and another man after leaving a restaurant. The two men tried to get G.T. to join them for a night out, and G.T. agreed to take them to an after-hours club where G.T. intended to drop them off and go home. G.T. and the two men found a taxi at a nearby gas station, where G.T. also encountered Mr. Roble and a taxi driver. G.T. accompanied the two men and Mr. Roble in the taxi to the after-hours club. G.T. got out of the taxi with the two men (leaving behind Mr. Roble and the driver), told another taxi to wait for her, and escorted the two men to the entrance of the club, which was in an alley off of the 2600 block of Georgia Avenue NW. As she started to leave the alley, G.T.

saw Mr. Roble and the taxi driver approach the club. She signaled the club to let them in as well, but she did not see all four men enter the club.

As G.T. was leaving the alley she heard Mr. Roble shout at her, and when she turned around she saw him running towards her. Mr. Roble tried to talk to G.T., but G.T. declined and said she had a cab waiting. Mr. Roble then grabbed G.T. by the wrists and dragged her back into the alley, which prompted G.T. to start shouting. G.T. struggled with Mr. Roble, and he tried to muffle her screams as he dragged her behind a more secluded area of the alley. Mr. Roble pushed G.T. to the ground and choked her as she continued to yell.

After a brief pause, Mr. Roble became more violent and dragged G.T. behind a black car parked in the alley. G.T. eventually submitted and stopped yelling because Mr. Roble was strangling her and she feared for her life. Mr. Roble opened G.T.'s pants and pulled them down to her thighs. He attempted to penetrate her vagina with his penis but could not get an erection. Mr. Roble paused his attack, but then held G.T. down, spat on his fingers, and penetrated her with his fingers. G.T. was menstruating on the date of the incident.

Daniel Diaz saw the incident from his apartment, which overlooked the alley. He was watching TV when he heard a woman yelling. He went to the window and saw a man dragging a woman behind a black car. Mr. Diaz then saw the man get between the woman's legs and hit her violently. Mr. Diaz called the police, and he saw police officers arrive while the man was still attacking the woman.

The Metropolitan Police Department ("MPD") officers who responded to the alley heard screaming and saw G.T. on her back, with Mr. Roble on top of her and in between her legs, but they could not see exactly what Mr. Roble was doing. As the officers moved closer, Mr. Roble got off G.T. and appeared to fumble with his pants. G.T. also pulled her pants up. G.T. was crying, appeared to be panicked and distressed, and was missing her shoes. An officer saw a red spot on one of the shirts Mr. Roble was wearing.

Sexual-assault nurse examiner Stacia Shryock examined G.T. shortly after the incident. Ms. Shryock noted bruises and abrasions over G.T.'s body, including on her neck and around her wrists. Ms. Shryock also noted an abrasion at the entrance to G.T.'s vagina. Ms. Shryock collected DNA swabs from G.T.'s vagina and other parts of her body. G.T. reported pain around her neck but denied having any pain to her vagina.

A sexual-assault expert, Dr. Suzanne Rotolo, testified that vaginal trauma occurs in about half of all reported rapes and that a victim may experience no physical trauma or only minor injuries for a number of reasons, including the presence of a lubricant such as saliva or menstrual blood. Dr. Rotolo could not pinpoint when G.T. received her bruises and abrasions, but opined that they occurred during a time frame that was consistent with the alleged attack. Dr. Rotolo further testified that the abrasion on G.T.'s vagina was consistent with digital penetration, but acknowledged that such an abrasion could also be consistent with other types of consensual penetration.

A forensic technician from MPD recovered a white t-shirt from Mr. Roble and collected swabs from Mr. Roble's hands and penis. An MPD Detective also took buccal swabs from Mr. Roble. An MPD forensic scientist testified that her lab conducted tests on the white t-shirt, Mr. Roble's swabs, and samples from G.T.'s rape kit. The tests found the presumptive presence of blood on the t-shirt. The swabs from the rape kit came up either inconclusive or negative, with the exception of one test from one of G.T.'s genital swabs that had a weak positive result suggesting the presence of semen. DNA testing on the stain from the white t-shirt came back as a match to G.T.'s DNA.

The defense introduced evidence that G.T. did not tell a police officer on the scene of the incident that she had been taking the men to an after-hours club.

II.

We turn first to the claims that Mr. Roble raises on direct appeal. We find no basis for relief, except that we vacate one merging conviction.

A.

Mr. Roble argues that there was insufficient evidence to support his convictions. We disagree.

We review challenges to the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to sustaining the verdict and "mindful of the jury's right to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *Hughes v. United States*, 150 A.3d 289, 305 (D.C. 2016) (internal quotation marks omitted). To prevail, the defendant "must establish that the government presented no evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." *Long v. United States*, 156 A.3d 698, 713 (D.C. 2017) (internal quotation marks omitted).

The evidence sufficed to permit the jury to find beyond a reasonable doubt that Mr. Roble kidnapped G.T.; committed first-degree sexual assault upon her by penetrating her vagina with his finger; committed attempted first-degree sexual assault by attempting to penetrate her vagina with his penis; and committed assault with intent to commit first-degree sexual assault by forcibly subduing her with the intent to sexually assault her. G.T. testified in detail about how Mr. Roble assaulted and sexually abused her: he grabbed her by the wrists, dragged her behind a car in an alley, threw her to the ground, strangled her, pulled down her pants, attempted to penetrate her vagina with his penis, and then penetrated her vagina with his fingers. G.T.'s account was corroborated by Mr. Diaz, who heard a woman yelling and saw a man drag a woman behind a car in the alley, get between her legs, and struggle with her. Two police officers testified that they found Mr. Roble on top of G.T. when they entered the alley, that Mr. Roble was fumbling with his pants, and that G.T. appeared panicked and distressed when officers got closer. The nurse who examined G.T. the night of the incident testified that G.T. had bruising and abrasions all over her body, including on her wrists and neck. G.T. also had an abrasion on her vagina, which the sexual-assault expert testified was consistent with digital penetration. Finally, G.T. was menstruating that evening and the forensic evidence established a match for G.T.'s DNA, and the presumptive presence of blood, on the stain on Mr. Roble's white t-shirt.

In arguing that the evidence was insufficient, Mr. Roble relies among other things on what he claims are gaps, inconsistencies, and contradictions in the witnesses' testimony at trial, as well as on the absence of his DNA on G.T.'s body. "[C]ontradictions among witnesses at trial are inevitable," however. *Hughes*, 150 A.3d at 305 (internal quotation marks omitted). Mr. Roble's arguments go to the weight of the evidence, which is a "matter[] for the jury to resolve," rather than to the sufficiency of the evidence. *Id.*

B.

Mr. Roble argues that the trial court abused its discretion by not replacing a court interpreter when Mr. Roble raised concerns about the interpreter's competence. We disagree.

Although G.T. spoke English, Italian was her language of choice and she testified at trial with the assistance of an interpreter. During G.T.'s testimony, the interpreter apparently made four errors in interpretation, each of which was promptly corrected by either G.T. or the interpreter: (1) that G.T. had "called," instead of "went" to, her hairdresser; (2) that Mr. Roble grabbed G.T.'s hand instead of her wrist; (3) that Mr. Roble did not have immigration status when it

was G.T. who did not; and (4) that G.T. was accompanying the men to the after-hours club. After the fourth error, Mr. Roble expressed concern that G.T.'s testimony was not being correctly translated. Noting that the interpreter was qualified by the Office of Interpretive Services, the trial court stated that it had not seen much of a problem with the interpretation. Mr. Roble made no further objections and requested no specific relief. We see no abuse of discretion. *See, e.g.*, *Ramirez v. United States*, 877 A.2d 1040, 1045 (D.C. 2005) (trial court did not abuse discretion where Spanish-speaking counsel notified trial court of four errors in interpretation, "and each of the[errors] was promptly dealt with by the trial court in a manner in which both counsel acquiesced").

C.

Mr. Roble argues that the trial court violated his rights under the Double Jeopardy clause by ordering Mr. Roble to pay restitution to G.T. six months after the initial sentencing. We hold that Mr. Roble waived that argument.

The trial court sentenced Mr. Roble on May 23, 2014. G.T. sought restitution from Mr. Roble before sentencing, but the court deferred resolving the issue of restitution to a later date. Mr. Roble's counsel explicitly agreed to postponing the issue of restitution to a post-sentencing hearing. The trial court subsequently ordered Mr. Roble to pay approximately $5,000 in restitution. Because Mr. Roble's counsel expressly consented to the trial court's decision to conduct a post-sentencing inquiry into restitution, Mr. Roble cannot challenge that decision on appeal. *EMC Mortg. Corp v. Patton*, 64 A.3d 182, 187 (D.C. 2013) ("It is well settled law that a party cannot complain of errors . . . to which it consented.") (internal quotation marks omitted); *Brown v. United States*, 627 A.2d 499, 508 (D.C. 1993) ("We have repeatedly held that a defendant may not take one position at trial and a contradictory position on appeal."). *See generally Nero v. District of Columbia*, 936 A.2d 310, 315 (D.C. 2007) (double-jeopardy right can be waived by counsel).

D.

Mr. Roble raises a number of additional arguments for the first time on appeal, and we therefore review those arguments for plain error. *E.g.*, *Lowery v. United States*, 3 A.3d 1169, 1172 (D.C. 2010). Under plain-error review, Mr. Roble bears the burden of showing that there was error; the error was clear or obvious; the error prejudiced Mr. Roble's substantial rights; and the "error seriously affect[ed] the fairness, integrity, or public reputation of judicial

proceedings." *Id.* at 1173 (internal quotation marks omitted). We find no plain error.

First, Mr. Roble argues that the United States conspired with Mr. Roble's trial counsel to unlawfully withhold exculpatory evidence, tamper with evidence, and mislead the jury. The trial record, however, does not support those claims. Moreover, to the extent Mr. Roble claims that exculpatory evidence was suppressed at trial, the trial record indicates that much of the evidence he identifies in fact was disclosed by the United States before trial.

Second, Mr. Roble challenges various remarks made by the prosecution during opening statement and closing argument. "Reversal for plain error in cases of alleged prosecutorial misconduct is confined to particularly egregious situations." *Chatmon v. United States*, 801 A.2d 92, 99 (D.C. 2002) (internal quotation marks omitted). We find no plain error in the challenged statements. For example, with respect to the charge of first-degree sexual abuse based on digital penetration of G.T.'s vagina, the United States was required to prove that Mr. Roble committed a "sexual act," which includes digital penetration of the vagina "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." D.C. Code §§ 22-3001 (8)(C), -3002 (2012 Repl. & 2017 Cum. Supp.). Given those elements, we see nothing egregious about statements that Mr. Roble violated G.T.'s "most personal and intimate part of her body" and that he sought to "degrade, abuse, and violate" someone he saw as "weak" or "vulnerable." *See Chatmon*, 801 A.2d at 100 ("In making its case to the jury, the government is not required to deliver a dispassionate presentation of sterile facts.").

Third, Mr. Roble argues that the trial court erroneously denied Mr. Roble's pretrial motion seeking disclosure of grand-jury transcripts. In this case, some testimony was presented to a first grand jury, but that grand jury expired, so the indictment was returned by a second grand jury. Mr. Roble sought to determine whether the United States read transcripts of the testimony before the first grand jury to the indicting grand jury. Mr. Roble did not object, however, when the trial court accepted the United States's proffer that the transcripts had been read to the indicting grand jury. We thus review for plain error, and we find none. *Cf., e.g.*, *Williams v. United States*, 75 A.3d 217, 222-24 (D.C. 2013) (alleged error in presenting false testimony to grand jury was harmless in light of guilty verdict at trial).

Fourth, Mr. Roble argues that the United States knowingly allowed several instances of false testimony to go uncorrected. Even assuming for the sake of

argument that the testimony at issue was false and that the United States was aware of that falsity, the testimony at issue involved relatively minor issues, such as whether G.T. apologized to the second grand jury for not mentioning to the first grand jury that she had been taking the men to an after-hours club. The evidence against Mr. Roble was overwhelming, and we are convinced that any error with respect to the testimony at issue did not so prejudice Mr. Roble's substantial rights as to justify reversal.

E.

Finally, with respect to the direct-appeal claims, Mr. Roble argues that various of his convictions merge. Although Mr. Roble initially argued that his conviction for assault with intent to commit first-degree sexual abuse should merge with his conviction for first-degree sexual abuse, he clarified at oral argument that he had intended to argue instead that his conviction for assault with intent to commit sexual abuse should merge with his conviction for attempted first-degree sexual abuse. We do not address the argument Mr. Roble has withdrawn. As to the argument Mr. Roble pressed at oral argument, the United States has stated that it does not oppose merger of Mr. Roble's conviction for assault with intent to commit sexual abuse and his conviction for attempted first-degree sexual abuse. We treat that issue as conceded, and we therefore remand for the trial court to vacate one of those convictions. Because the sentences on those convictions are concurrent, there is no need for resentencing. *Bernal v. United States*, 162 A.3d 128, 130 n.2 (D.C. 2017).

Mr. Roble also argues that his kidnapping conviction merges with his sexual-abuse convictions. We disagree. "If the same act or transaction violates two separate statutes, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." *Bryant v. United States*, 859 A.2d 1093, 1108 (D.C. 2004) (internal quotation marks omitted). Mr. Roble's kidnapping conviction does not merge with any of the sexual-abuse convictions, because "detention is not an element of sexual abuse, and each [of the sexual-abuse convictions] has at least one element that [kidnapping] does not have." *Id.* at 1108.

III.

Following his conviction, Mr. Roble filed a motion pursuant to D.C. Code § 23-110 (2012 Repl.), raising various claims, including that trial counsel had provided ineffective assistance of counsel. The trial court denied the motion after a hearing. We affirm the trial court's denial of the § 23-110 motion.

A.

Mr. Roble first argues that the trial court failed to respond appropriately to Mr. Roble's pretrial complaint about his trial counsel. We disagree.

Before trial, Mr. Roble sent a letter asking the trial court to inquire into his trial counsel's performance, specifically alleging that counsel had not attempted to investigate the witnesses involved in the case. The trial court raised those concerns with counsel at a hearing shortly thereafter. Trial counsel explained that she had talked to "central witnesses," had worked on DNA evidence, and was in the process of reviewing discovery. The trial court told Mr. Roble that trial counsel was one of the best attorneys available and that the trial court was concerned that appointing a new attorney would delay Mr. Roble's trial. After Mr. Roble raised additional concerns, the trial court responded that trial counsel was doing everything that could be expected on Mr. Roble's behalf. After urging Mr. Roble to work with counsel, the trial court stated it would revisit the issue later. Mr. Roble raised no objection to that approach.

The trial court, Mr. Roble, and trial counsel revisited the letter at a hearing just before trial. Trial counsel stated that Mr. Roble and she were happy to proceed to trial, but that there was a disagreement as to whether one particular witness should be called to testify. The trial court explained that trial counsel had the final say about what witnesses to call, but urged Mr. Roble and counsel to work to reach a resolution of the disagreement. When the trial court asked Mr. Roble if he was satisfied with counsel's representation, Mr. Roble responded, "She's been working hard."

"[W]hen a defendant makes a pre-trial claim of ineffective assistance of counsel due to lack of investigation, preparation, or other substantial reason, the trial court has a duty to conduct an inquiry sufficient to determine the truth and scope of the defendant's allegations." *Lane v. United States*, 737 A.2d 541, 547 (D.C. 1999) (internal quotation marks omitted). "The substance of the [defendant's] complaints about counsel's performance governs the nature of the mandated inquiry." *Wingate v. United States*, 669 A.2d 1275, 1281 (D.C. 1995). We review the trial court's handling of such a complaint for abuse of discretion. *Id.* at 1284.

As described above, the trial court made reasonable efforts to examine Mr. Roble's complaints, specifically addressed those concerns, and determined that the trial attorney's performance was adequate. Moreover, Mr. Roble indicated that he was satisfied with his counsel after the trial court's second inquiry, thus ending the

trial court's obligation to inquire further. *McKenzie v. United States*, 659 A.2d 838, 840 (D.C. 1995). We see no abuse of discretion.

B.

Mr. Roble also raises numerous challenges to the adequacy of his trial attorney's performance. We see no ground for relief.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant claiming ineffective assistance of trial counsel "must show (1) deficient performance by . . . trial counsel, and (2) prejudice traceable to . . . trial counsel's deficiencies." *Zanders v. United States*, 678 A.2d 556, 569 (D.C. 1996). "The burden is a heavy one because of a strong presumption that defense counsel has rendered reasonable professional assistance." *Id.* "Trial tactical decisions generally do not result in a finding of ineffective assistance of counsel." *Id.* "[T]o prove prejudice[, the defendant] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citation and internal quotation marks omitted). When deciding a claim of ineffective assistance of counsel, we review legal conclusions de novo and factual findings for clear error. *Dobson v. United States*, 815 A.2d 748, 755 (D.C. 2003).

First, with respect to Mr. Roble's claims about jury selection, the trial court did not credit Mr. Roble's testimony at the § 23-110 hearing, instead crediting the testimony of Mr. Roble's trial attorney that she had explained jury selection to Mr. Roble, that she had considered Mr. Roble's views, and that Mr. Roble had expressed satisfaction with the jury that was selected. We have no basis to look behind that credibility determination. *See, e.g., Bouknight v. United States*, 867 A.2d 245, 251 (D.C. 2005) (The trial court's factual findings in deciding claims of ineffective assistance of counsel must be upheld "if they are supported by evidence in the record. The determination of credibility is for the finder of fact, and is entitled to substantial deference.") (citations omitted).

Second, the trial court similarly credited trial counsel's testimony, as well as the testimony of trial counsel's investigator, that trial counsel made efforts to secure a bench trial for Mr. Roble, but that Mr. Roble eventually chose to be tried by a jury pursuant to trial counsel's advice. We have no grounds upon which to question the trial court's factual findings or the adequacy of trial counsel's performance on this topic.

Third, we are satisfied that trial counsel diligently advised Mr. Roble of his right to testify and that Mr. Roble voluntarily chose not to testify at trial. The trial court credited trial counsel's testimony detailing her efforts to advise Mr. Roble of his right to testify, which included conducting a "mock cross-examination" that convinced Mr. Roble not to testify. *See Kelly v. United States*, 590 A.2d 1031, 1035 (D.C. 1991) ("The judge could properly credit trial counsel's testimony that he had discussed the [the right to testify] with appellant and provided appellant with good reasons why it would not be in his best interest to testify."). Furthermore, the trial court conducted an inquiry into whether Mr. Roble wished to testify, and Mr. Roble stated that he chose not to testify.

Fourth, the trial court found that, throughout the proceedings, Mr. Roble showed no difficulty with understanding, speaking, and writing English. We defer to the trial court's finding, based on the court's extensive experience with Mr. Roble, and we therefore conclude that trial counsel was not ineffective for not securing interpretation services for Mr. Roble. *See Rivera v. United States*, 941 A.2d 434, 442 (D.C. 2008) (trial counsel not ineffective where defendant did not request interpreter at trial and there was no indication that defendant had trouble communicating with counsel).

Fifth, with respect to the admission of evidence about the white t-shirt, an MPD forensic technician testified at trial that he personally collected the shirt from Mr. Roble on the morning of the incident. Mr. Roble contends that the shirt was not his and was tampered with, raising concerns such as that an evidence list was missing a signature and that there was no photographic or DNA evidence linking him to the shirt. In light of the forensic technician's testimony, the concerns Mr. Roble raises did not provide a plausible basis upon which to exclude the t-shirt from evidence. *See, e.g.*, *Brooks v. United States*, 993 A.2d 1090, 1094 (D.C. 2010) ("Gaps in the chain of custody normally go to the weight of the evidence rather than its admissibility.") (brackets and internal quotation marks omitted). Trial counsel's "failure to file a meritless motion does not constitute ineffective assistance of counsel." *Washington v. United States*, 689 A.2d 568, 572 (D.C. 1997).

Sixth, although trial counsel did not explore every possible avenue of bias or question G.T. on every inconsistent statement, the record supports the trial court's conclusion that trial counsel vigorously cross-examined and impeached G.T. at trial, including on her immigration status and her omission about the after-hours club. G.T. also admitted at trial to lying to the first grand jury. Given that G.T.'s credibility was thoroughly examined at trial, and given the overwhelming evidence

against Mr. Roble, we see no reasonable probability that additional questioning on the topics raised by Mr. Roble would have changed the outcome of the trial.

Seventh, with respect to trial counsel's alleged failure to investigate and to call witnesses, Mr. Roble focuses primarily on a defense expert, Dr. Noureddine, whom trial counsel did not call as a witness at trial. In Dr. Noureddine's view, the prosecution's testing results were incorrect or inaccurate in several respects. Specifically, Dr. Noureddine disagreed with the prosecution's conclusions that tests indicated the presence of semen on G.T.'s genital swabs and the presence of blood on the white t-shirt. Before trial, however, and contrary to the advice of both trial counsel and Dr. Noureddine, Mr. Roble decided that he wished to have independent forensic testing of the white t-shirt. Dr. Noureddine conducted that testing, which showed that Mr. Roble's DNA was on the shirt. Trial counsel spoke with Dr. Noureddine, who opined that he should not testify given the DNA result. Trial counsel communicated the DNA result to Mr. Roble, who agreed that Dr. Noureddine would no longer be a good witness for the defense. Trial counsel did, however, retain Dr. Noureddine to consult at trial.

To the extent that Mr. Roble suggests that trial counsel should have called Dr. Noureddine as a witness notwithstanding the unfavorable DNA result, we agree with the trial court that trial counsel made a reasonable tactical decision not to call Dr. Noureddine. Mr. Roble also suggests, however, that trial counsel should have foreseen the potential problem and retained a second expert to conduct the testing, so that there was no risk of losing Dr. Noureddine's favorable testimony. We are skeptical that trial counsel's performance on this point was deficient, at least in the absence of evidence that trial counsel had reason to believe that no other expert could replace Dr. Noureddine in the event that Dr. Noureddine could not testify. *Cf. Curry v. United States*, 498 A.2d 534, 540 (D.C. 1985) ("Mere errors of judgment and tactics as disclosed by hindsight do not, by themselves, constitute ineffectiveness."). In any event, given the overwhelming evidence against Mr. Roble, we see no reasonable probability that Dr. Noureddine's anticipated testimony would have changed the outcome of the trial.

Eighth, Mr. Roble did not establish prejudice with respect to his claims that trial counsel should have investigated and subpoenaed various other witnesses and documents. Only one of his potential witnesses, Mr. Hailu, testified at the § 23-110 hearing, and the trial court correctly concluded that much of Mr. Hailu's testimony was collateral to the case, was based on hearsay, or would not have been exculpatory. As to the other potential evidence, Mr. Roble did not provide any "affidavit[s] or other credible proffer as to the allegedly exculpatory nature" of that evidence. *Jones v. United States*, 918 A.2d 389, 403 (D.C. 2007).

C.

Finally, Mr. Roble argues that the trial court erred in (1) allowing the introduction of a photograph of G.T.'s dirty pants at trial, and (2) failing to find prosecutorial misconduct based upon the transfer of Mr. Roble between jails in Virginia and the District of Columbia shortly before trial. We perceive no error, but in any event we also see no basis for reversal on those grounds, given the overwhelming evidence against Mr. Roble.

For the foregoing reasons, the judgment and order of the Superior Court are affirmed, except that the case is remanded to the Superior Court for vacation of a merging conviction and entry of an amended judgment and commitment order.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Robert E. Morin

Director, Criminal Division

Copies e-served to:

Elizabeth Trosman, Esquire
Assistant United States Attorney

Tomas D. Engle, Esquire

District of Columbia
Court of Appeals

Nos. 14-CF-668, 15-CO-376 & 16-CO-351

MOHAMMED SULEIMAN ROBLE,

Appellant,

v. **CF1-6095-13**

UNITED STATES,

Appellee,

EXHIBIT C

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman, Fisher, Thompson, Beckwith, Easterly, and McLeese, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing *en banc*, and appellant's motion for leave to file a supplemental petition for rehearing *en banc*; and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

ORDERED that appellant's motion for leave to file a supplemental petition for rehearing *en banc* is denied. It is

FURTHER ORDERED that the petition for rehearing *en banc* is denied.

PER CURIAM

Copies to:

Honorable Robert E. Morin

Director, Criminal Division

Nos. 14-CF-668, 15-CO-376 & 16-CO-351

Copies to:

Mohammed Suleiman Roble
FED #80570-083, Rivers CI
P.O. Box 630
Winton, NC 27986

Copies e-served to:

Thomas D. Engle, Esquire
601 Pennsylvania Avenue, NW
Suite 900 South
Washington, DC 20004

Elizabeth Trosman, Esquire
Assistant United States Attorney

bep

Additional material from this filing is available in the Clerk's Office.