No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

YARA CHUM,
Petitioner

v.

PATRICIA ANNE COYNE-FAGUE
Director of the Adult Correctional Institutions,
Respondent

_____

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIRST CIRCUIT

_____

APPENDIX

_____

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APPENDIX A

Chum v. Coyne-Fague

United States Court of Appeals for the First Circuit

January 27, 2020, Decided

No. 18-2028

Reporter
948 F.3d 438 *; 2020 U.S. App. LEXIS 2505 **; 2020 WL 415142

YARA CHUM, Petitioner, Appellant, v. PATRICIA ANNE COYNE-FAGUE, Acting Director of the Adult Correctional Institutions, Respondent, Appellee.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. Hon. John J. McConnell, Jr., U.S. District Judge.

Chum v. Wall, 2018 U.S. Dist. LEXIS 169119 (D.R.I., Oct. 1, 2018)

Core Terms

incurable, mistrial, trial justice, ineffective, assessing, reasonable probability, district court, federal law, assistance of counsel, curative instruction, comments, state court, confession, shooting, prong, opening statement, state law, postconviction, overwhelming, firearms, assault

Case Summary

Overview

HOLDINGS: [1]-An inmate, who was convicted of assault and firearms charges, and who alleged that he was denied his *Sixth Amendment* right to the effective assistance of counsel when his attorney did not move for a mistrial was not entitled to *§ 2254* relief because the state supreme court's evaluation of this claim did not involve an unreasonable application clearly established federal law; [2]-The state supreme court did not replace or otherwise equate Strickland with its own standard but rather, it properly asked whether there was a reasonable probability that the trial judge would have granted a mistrial motion, and it appropriately considered the overwhelming evidence of guilt and curative instructions to conclude that a mistrial would not have been granted under state law such that the failure to move for a mistrial did not result in Strickland prejudice.

Outcome
Decision affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Prohibition Against Improper Statements

HN1 **Prosecutorial Misconduct, Prohibition Against Improper Statements**

Incurable prejudice is the standard used in Rhode Island to assess whether a prosecutor's improper statements made to a jury prejudiced the defendant in a way that cannot be corrected through instructions by the judge, such that a mistrial is required.

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

HN2[] Standards of Review, Contrary & Unreasonable Standard

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, if the state court has adjudicated an appellant's claims on the merits, a federal court may grant habeas relief only if the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, 28 U.S.C.S. § 2254(d)(1), or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, § 2254(d)(2).

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Contrary to Clearly Established Federal Law

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Unreasonable Application

HN3[] Contrary & Unreasonable Standard, Contrary to Clearly Established Federal Law

An adjudication is contrary to clearly established law under 28 U.S.C.S. § 2254(d) if the state court applies a rule that contradicts the governing law set forth by the U.S. Supreme Court or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from its precedent. An adjudication involves an unreasonable application if the state court identifies the correct governing legal principle from the Supreme Court's then-current decisions but unreasonably applies that principle to the facts of the prisoner's case.

Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review

HN4[] Appeals, Standards of Review

When the district court does not engage in independent factfinding in a federal habeas case, the appellate courts are effectively in the same position as the district court vis-à-vis the state court record.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN5[] Criminal Process, Assistance of Counsel

To succeed with a Sixth Amendment claim of ineffective assistance of counsel, a habeas petitioner must establish both that his counsel's representation fell below an objective standard of reasonableness, known as the performance prong, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, known as the prejudice prong.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN6[] Criminal Process, Assistance of Counsel

To successfully prove prejudice for an ineffective assistance of counsel claim, a habeas petitioner may not simply show that counsel's errors had some conceivable effect on the outcome, but, on the other hand, he also need not show that counsel's deficient conduct more likely than not altered the outcome in the case. Rather, a petitioner must show that, but for counsel's deficient performance, there is a reasonable probability of a different outcome, meaning a probability sufficient to undermine confidence in the outcome.

Criminal Law & Procedure > Appeals > Reversible Error > Prosecutorial Misconduct

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

HN7 **Reversible Error, Prosecutorial Misconduct**

Under Rhode Island law, trial courts use an incurable prejudice standard to assess whether improper comments made by a prosecutor create reversible error. Under this standard, reversible error occurs if the allegedly improper comment was so flagrantly impermissible that even a precautionary instruction would have been insufficient to dispel the prejudice in the jurors' minds and to assure a defendant a fair and impartial trial.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Tests for Prosecutorial Misconduct

HN8 **Prosecutorial Misconduct, Tests for Prosecutorial Misconduct**

While incurable prejudice inheres in prosecutorial comments that are totally extraneous to the issues in the case and tend to inflame and arouse the passions of the jury against the defendant, comments that do not create such flagrant bias must be assessed with the other circumstances of the case in mind. Determination of whether a challenged remark is harmful or prejudicial cannot be decided by any fixed rule of law. Rather, in assessing whether a challenged remark has created incurable prejudice, a trial justice must evaluate the comment's probable effect on the outcome of the case by examining the remark in its factual context. Thus, the weight of the evidence is relevant, as are any curative instructions, in deciding whether a prosecutor's remarks have created incurable prejudice, requiring either a mistrial to be granted or, on appeal, a conviction to be vacated. Under Rhode Island law, a motion for a mistrial is left to the discretion of the trial justice and will not be disturbed on appeal unless clearly wrong.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Tests for Prosecutorial Misconduct

HN9 **Prosecutorial Misconduct, Tests for Prosecutorial Misconduct**

In addition to the weight of the evidence and curative instructions, the fact that defense counsel did not move for a mistrial or request curative instructions in response to a prosecutor's improper statements can also be evidence under Rhode Island law that the statements did not cause incurable prejudice. In the context of a direct appeal, the Rhode Island Supreme Court sometimes looks to the defense counsel's own course of action after improper prosecutorial comments to assess how prejudicial the comments were: if the statements were highly prejudicial, defense counsel would have responded, either by moving for a mistrial or seeking another remedy.

Criminal Law & Procedure > Habeas Corpus > Appeals

HN10 **Habeas Corpus, Appeals**

When a petitioner seeking postconviction relief pursues an argument on appeal that he failed to develop in his habeas petition in the district court, an appellate court may nonetheless address the merits of the inadequately preserved argument in exceptional cases. Among the relevant factors to consider are whether the argument concerns constitutional rights of both the appellant and future defendants, raises an important question of law, can be resolved on the existing record, was fully briefed by the parties, and is likely to be repeated in future cases.

Criminal Law & Procedure > Appeals > Reversible Error > Prosecutorial Misconduct

HN11 **Reversible Error, Prosecutorial Misconduct**

Under Rhode Island law, the incurable prejudice standard governs whether a court should grant a mistrial based on improper prosecutorial comments. When assessing whether a mistrial is warranted in such circumstances, a court must ask whether the comments have caused prejudice that is inexpiable and incurable by timely instructions.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN12[] **Criminal Process, Assistance of Counsel**

Strickland makes clear that a reviewing court should not assess the prejudice stemming from trial counsel's deficient performance based on the particular trial judge assigned to the case. Rather, the assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision not on the idiosyncrasies of the particular decisionmaker who presided at the trial level.

Counsel: Camille A. McKenna, Assistant Public Defender, Appellate Division, Rhode Island Public Defender, for petitioner.

Lauren S. Zurier, Assistant Attorney General, Office of the Attorney General, for respondent.

Judges: Before Lynch, Lipez, and Thompson, Circuit Judges.

Opinion by: LIPEZ

Opinion

[*441] LIPEZ, Circuit Judge. Petitioner Yara Chum, who was convicted in Rhode Island state court on felony assault and firearms charges, claims that he was denied his *Sixth Amendment* right to the effective assistance of counsel when his attorney did not move for a mistrial after the State failed to introduce evidence of Chum's confession described in the prosecutor's opening statement. Chum now seeks a writ of habeas corpus on the ground that the Rhode Island Supreme Court's evaluation of his constitutional claim was contrary to, or involved an unreasonable application of, federal law. Specifically, Chum contends that the state court applied an "incurable prejudice" standard, rather than the prejudice standard established in *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. **HN1**[] Incurable prejudice is the standard used in Rhode Island to assess whether a prosecutor's improper **[**2]** statements made to a jury prejudiced the defendant in a way that cannot be corrected through instructions by the judge, such that a mistrial is required. See *State v. Perry, 779 A.2d 622, 628 (R.I. 2001)*.

Because we conclude that the Rhode Island Supreme Court's use of the incurable prejudice standard in the course of assessing Chum's ineffective assistance of counsel claim was not contrary to, or an unreasonable application of, federal law, we affirm the district court decision denying the petition for habeas corpus relief.

I.

A. Factual Background

Chum was convicted on assault and firearms charges stemming from his participation in a shooting in Providence, Rhode Island, in March 2009, after "a drug deal [went] awry." *State v. Chum, 54 A.3d 455, 457 (R.I. 2012)*. Chum was not involved in the drug transaction, but he and his associate Samnang Tep confronted three men who lived with the drug dealer about their involvement in a conflict that followed the disputed marijuana sale. As a result of the dispute, someone had shattered the windows at the residence of Chum's friend, and Chum asked the three men, while they stood on their front porch, whether they were to blame. After a verbal exchange, the conflict escalated. Chum ordered Tep to shoot the men on the porch. Tep fired **[**3]** a single shot in the direction of the porch, hitting the porch railing. No one was hit.

Chum was arrested shortly thereafter. Later that evening, after indicating that he understood his Miranda rights, he made an oral statement admitting he was involved in the shooting.[1] At trial, the prosecutor

[1] Chum's motion to suppress his statement was denied after

referenced Chum's admission in his opening statement[2]:

> I told you we'd prove this case with witnesses; we'd also prove it with the defendant's words himself, because, when the detectives came to the Cranston Police Department, they read him his rights and sat down and talked to him. And the defendant told him that he **[*442]** was contacted by Erin [Murray] and told that she needed him to take care of something; that she wanted them to take care of some kid named Frankie for smashing her windows; that he drove down to Peach Avenue with Matthew DePetrillo and Erin [Murray] so that they could point out the house; that he approached the house with a friend, Vang Chhit; that he approached some guys on the porch; that he ordered Chhit to shoot the guys; that Erin [Murray], Matthew DePetrillo and Samnang Tep were in a different car waiting around the corner; and that he and Chhit fled in separate cars, one red, **[**4]** and one white. You'll hear that. You'll hear about the defendant giving that statement to the Providence Police.

Chum v. State, 160 A.3d 295, 297 (R.I. 2017).[3] Despite these comments, the State never introduced Chum's statement into evidence. However, the trial justice admonished the jury four times during the trial that the statements of lawyers are not evidence.[4]

B. Procedural History

At the close of trial, the court entered a judgment of acquittal on a count charging conspiracy to commit assault with a dangerous weapon and the State dismissed a charge of carrying a firearm while committing a crime of violence. However, the jury convicted Chum on the three remaining counts: two counts of assault with a dangerous weapon and one count of discharging a firearm while committing a crime of violence. After denying Chum's motion for a new trial, the trial justice sentenced Chum to ten years' imprisonment on each felony assault count, to be served concurrently, and a consecutive ten-year sentence on the firearms count, with five years to serve and five years suspended, with probation.

After his conviction was affirmed by the Rhode Island Supreme Court, Chum applied for postconviction relief based on the ineffective assistance of counsel, **[**5]** asserting that his lawyer violated his *Sixth Amendment* right by failing to move for a mistrial or request a curative instruction after the State described Chum's alleged confession in its opening statement but did not introduce evidence of the confession. The Rhode Island Superior Court denied the application, in a decision written by the trial justice who had presided over Chum's trial. In that decision, the trial justice stated that he would not have granted a mistrial if Chum's counsel had moved for one. *Chum v. State, No. PM131919, 2014 R.I. Super. LEXIS 163, 2014 WL 6855341, at *3 (R.I. Super. Ct. Dec. 1, 2014)*. The trial justice also noted the "overwhelming" evidence of Chum's guilt and the fact that the court had reminded the jury four separate times that statements of counsel were not evidence. Id. In 2017, the Rhode Island Supreme Court affirmed. *Chum, 160 A.3d at 296*.

[*443] Chum filed a petition for a writ of habeas corpus in federal court pursuant to *28 U.S.C. § 2254*, again claiming ineffective assistance of counsel in violation of the *Sixth Amendment*. Chum argued that, because of the unique power of confession evidence, his lawyer's failure to move for a mistrial was highly prejudicial, rising to the level of constitutionally deficient assistance of counsel. The district court denied the petition on the merits in October **[**6]** 2018, holding that the Rhode Island Supreme Court's decision was neither contrary to

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an evidentiary hearing. The Rhode Island Supreme Court affirmed that decision in Chum's direct appeal. *Chum, 54 A.3d at 461-62*.

[2] The prosecutor's opening statement references numerous individuals by name. Because the roles of these individuals within the conflict are not material to our analysis, we do not provide background about them.

[3] The evidence at trial showed that Tep, rather than Chhit, was the shooter, despite the prosecutor's comment that Chum had identified Chhit as the shooter in his statement to the police. *Chum, 160 A.3d at 297 n.3*.

[4] Although Chum's trial counsel did not request them, the trial justice gave the following standard instructions to the jury: (1) "I tell you now, and I probably will remind you before this case is over, the statements of lawyers are not evidence"; (2) "I told you before we started, ladies and gentlemen, that the statements of lawyers are not evidence"; (3) "I told the jury earlier, when we started this trial, that statements [of] lawyers are not evidence"; and (4) "Counsel will now address you, and I, again, remind you of what I said before, and that is that their statements and their arguments are not evidence. If the lawyer says something that doesn't correlate with your memory, it's your memories that count, not the memories of counsel." *Chum, 160 A.3d at 298 n.5*.

nor an unreasonable application of the federal standard governing ineffective assistance of counsel claims. *Chum v. Wall, No. 17-541-JJM-LDA, 2018 U.S. Dist. LEXIS 169119, 2018 WL 4696739, at *1 (D.R.I. Oct. 1, 2018)*. Although the district court concluded that Chum's lawyer's performance was constitutionally deficient, it determined that the Rhode Island Supreme Court's conclusion that Chum had not satisfied the prejudice prong, given the weight of the evidence and the trial justice's cautionary instructions, was not an unreasonable application of clearly established federal law. *2018 U.S. Dist. LEXIS 169119, [WL] at *4-5*. However, the district court issued a certificate of appealability and Chum timely filed this appeal.

II.

HN2[↑] Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), if the state court has adjudicated an appellant's claims on the merits, a federal court may grant habeas relief only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *28 U.S.C. § 2254(d)(1)*, or "resulted in a decision that was based on an unreasonable determination of the facts in **[**7]** light of the evidence presented in the State court proceeding," id. *§ 2254(d)(2)*. Chum asserts a claim under the first section only.

HN3[↑] An adjudication is contrary to clearly established law if the state court "'applies a rule that contradicts the governing law set forth' by the Supreme Court or 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent.'" *Gomes v. Brady, 564 F.3d 532, 537 (1st Cir. 2009)* (alterations in original) (quoting *Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*). An adjudication involves an unreasonable application "if the state court identifies the correct governing legal principle from the Supreme Court's then-current decisions but unreasonably applies that principle to the facts of the prisoner's case." *Abrante v. St. Amand, 595 F.3d 11, 15 (1st Cir. 2010)* (internal quotation marks omitted).

HN4[↑] When, as here, the district court does not engage in independent factfinding in a federal habeas case, "we are effectively in the same position as the district court vis-à-vis the state court record." *Pike v. Guarino, 492 F.3d 61, 68 (1st Cir. 2007)*.

III.

A. Ineffective Assistance of Counsel Standard

HN5[↑] To succeed with a *Sixth Amendment* claim of ineffective assistance of counsel, a petitioner must establish both that his "counsel's representation fell below an objective standard of reasonableness," **[**8]** known as the performance prong, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," known as the prejudice prong. *Strickland, 466 U.S. at 688, 694* **[*444]** . Only the prejudice prong is at issue here.[5]

HN6[↑] To successfully prove prejudice, a petitioner may not simply show that counsel's errors had "some conceivable effect on the outcome," but, on the other hand, he also "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id. at 693*. Rather, a petitioner must show that, but for counsel's deficient performance, there is a "reasonable probability" of a different outcome, meaning "a probability sufficient to undermine confidence in the outcome." *Id. at 694*.

B. Rhode Island's "Incurable Prejudice" Standard

HN7[↑] Under Rhode Island law, trial courts use an "incurable prejudice" standard to assess whether improper comments made by a prosecutor create reversible error. *Perry, 779 A.2d at 628*. Under this standard, "reversible error occurs if the allegedly improper comment was so flagrantly impermissible that even a precautionary instruction would have been insufficient to dispel the prejudice in the jurors' minds and to assure [a] defendant **[**9]** a fair and impartial trial." *State v. Collazo, 446 A.2d 1006, 1010 (R.I. 1982)*.

HN8[↑] While incurable prejudice "inheres" in prosecutorial comments that "'are totally extraneous to

[5] Rhode Island has conceded, for purposes of this appeal, that Chum has established his attorney's deficient performance. Therefore, we will not address that prong of the Strickland analysis.

the issues in the case and tend to inflame and arouse the passions of the jury' against the defendant," comments that do not create such flagrant bias must be assessed with the other circumstances of the case in mind. *Ware, 524 A.2d at 1112* (quoting *State v. Mancini, 108 R.I. 261, 274 A.2d 742, 748 (R.I. 1971)*). "Determination of whether a challenged remark is harmful or prejudicial cannot be decided by any fixed rule of law." *Collazo, 446 A.2d at 1010*. Rather, in assessing whether a challenged remark has created incurable prejudice, a trial justice "must evaluate [the comment's] probable effect on the outcome of the case by examining the remark in its factual context." Id. Thus, the weight of the evidence is relevant, as are any curative instructions, in deciding whether a prosecutor's remarks have created incurable prejudice, requiring either a mistrial to be granted or, on appeal, a conviction to be vacated.[6] See, e.g., *Perry, 779 A.2d at 627-28* (finding no incurable prejudice and upholding conviction given overwhelming evidence of guilt and curative instructions given by the trial justice, even though prosecutor stated in opening that a confidential informant would testify about defendant's **[**10]** alleged admissions, but the informant did not do so); *Ware, 524 A.2d at 1113* **[*445]** (holding that prosecutor's statements did not create incurable prejudice in light of the curative instructions and "ample independent evidence" of defendant's guilt). Under Rhode Island law, a motion for a mistrial is left to the discretion of the trial justice and "will not be disturbed on appeal unless clearly wrong." *Ware, 524 A.2d at 1112*.

IV.

In denying Chum's petition for postconviction relief based on ineffective assistance of counsel, the Rhode Island Supreme Court articulated the correct standard for ineffective assistance, laid out in Strickland. It then framed the issue presented in terms of Rhode Island's state law "incurable prejudice" standard: the case required it to decide "whether a prosecutor's reference to an admission in an opening statement and subsequent failure to introduce it into evidence amounts to incurable prejudice." *Chum, 160 A.3d at 299-300*.

Chum argues that the state court's use of the incurable prejudice standard was contrary to the Strickland prejudice standard, and the state court's conclusion that there was no prejudice was an unreasonable application of the Strickland standard because there is a reasonable probability that, if the **[**11]** trial attorney had moved for a mistrial, it would have been granted.[7] We consider each of these two contentions in turn.

A. "Contrary To" Strickland

1. Waiver

Although Chum asserted generally in his habeas petition in the district court that the Rhode Island Supreme Court's decision was either "contrary to, or an unreasonable application of," federal law, he did not develop any argument regarding the "contrary to" prong, including any argument about the Rhode Island Supreme Court's application of the incurable prejudice standard. Rather, his argument focused on the Rhode Island Supreme Court's use of the Strickland prejudice standard without reference to its use of the State's incurable prejudice standard. Accordingly, the government now argues that Chum has waived the primary argument he makes on appeal: that the Rhode Island Supreme Court's use of the incurable prejudice standard is contrary to clearly established federal law.

To rebut this waiver argument, Chum points to the

[6] *HN9*[] In addition to the weight of the evidence and curative instructions, the fact that defense counsel did not move for a mistrial or request curative instructions in response to a prosecutor's improper statements can also be evidence under Rhode Island law that the statements did not cause incurable prejudice. See, e.g., *Perry, 779 A.2d at 628*. In the context of a direct appeal, the Rhode Island Supreme Court sometimes looks to the defense counsel's own course of action after improper prosecutorial comments to assess how prejudicial the comments were: if the statements were highly prejudicial, defense counsel would have responded, either by moving for a mistrial or seeking another remedy. However, in this post-conviction challenge, the Rhode Island Supreme Court rightly did not rely on the defense counsel's response in concluding that there was no incurable prejudice. Here, defense counsel's failure to respond to the prosecutor's comments is precisely what is at issue in this appeal.

[7] Chum argues that, when failure to move for a mistrial is the basis for an ineffective assistance of counsel claim, showing a reasonable probability that a mistrial would have been granted satisfies the Strickland prejudice standard. We agree and, therefore, need not address his alternative argument that, to the extent that a petitioner must also show a reasonable probability of prevailing at a new trial, he would satisfy even this higher burden.

district court's conclusion that the Rhode Island Supreme Court's decision was neither contrary to, nor an unreasonable application of, clearly established federal law. But Chum's general reference to both **[**12]** prongs of § 2254, and the district court's conclusion that neither had been satisfied, is no substitute for the development of a "contrary to" argument, in general, or his argument regarding incurable prejudice, in particular, in the district court. Chum is certainly vulnerable to a waiver argument.

We confronted this identical issue in Castillo v. Matesanz, 348 F.3d 1 (1st Cir. 2003). **HN10**[] In that case, we held that, when a petitioner seeking postconviction relief pursues an argument on appeal that he failed to develop in his habeas petition in **[*446]** the district court, an appellate court may nonetheless address the merits of the inadequately preserved argument in exceptional cases. See id. at 12. Among the relevant factors to consider are whether the argument concerns constitutional rights of both the appellant and future defendants, raises an important question of law, can be resolved on the existing record, was fully briefed by the parties, and is likely to be repeated in future cases. See id.

Chum's argument concerning the "incurable prejudice" standard is a pure question of law, which may be resolved without additional factfinding and based on the briefs filed by the parties. Rhode Island is likely to continue applying this state standard in the context **[**13]** of ineffective assistance of counsel claims, and whether the use of the "incurable prejudice" standard resulted in a decision contrary to Strickland implicates important constitutional rights of Chum and, potentially, other petitioners in Rhode Island. We therefore consider the merits of Chum's claim.

2. The Rhode Island Supreme Court's Reliance on the Incurable Prejudice Standard[8]

[8] We reject the State's attempt to dispose of Chum's claim by asserting that the state high court referenced the Rhode Island incurable prejudice standard in assessing only the performance prong -- which is not at issue in this appeal -- of Chum's ineffective assistance claim, not as part of the prejudice analysis. Under the State's theory, Chum's "contrary to" argument fails because the state court never used the incurable prejudice standard to assess the prejudice prong and, therefore, could not have impermissibly replaced the appropriate Strickland prejudice standard with the state standard. This reading of the Rhode Island Supreme Court's decision is untenable.

a. The Rhode Island Supreme Court's Decision

After articulating the ineffective assistance standard laid out in Strickland and the incurable prejudice standard for assessing the prejudice stemming from a prosecutor's improper opening statements, the Rhode Island Supreme Court reviewed the steps Chum's lawyer could have taken when the government failed to introduce evidence of Chum's confession as promised. Chum's trial counsel could have (1) commented on the government's unfulfilled promise in his closing argument; (2) moved for a mistrial; or (3) requested a curative instruction. Chum, 160 A.3d at 299.

The Rhode Island Supreme Court explained why there was no prejudice stemming from Chum's counsel's failure to pursue any of these options. First, the court concluded that the evidence, including testimony from three eyewitnesses **[**14]** to the shooting, was "overwhelming." Id. at 300. Second, the trial justice sua sponte instructed the jury four times over the course of the trial that statements of counsel are not evidence. Id. Finally, the court concluded that "the trial attorney's failure to move for a mistrial was not prejudicial because the trial justice, in denying Chum's application for postconviction relief, stated that he would not have granted a mistrial even if the attorney had so moved." Id.

b. The Propriety of the State High Court's Analysis

Chum's argument in this court focuses exclusively on the Rhode Island Supreme Court's analysis of the prejudice stemming from his lawyer's failure to move for a mistrial. Chum contends that the court improperly assessed that deficiency by replacing the reasonable probability test from Strickland with the state law incurable prejudice standard. According to Chum, evaluating the prejudice issue under the wrong standard resulted in **[*447]** a decision contrary to federal law. We disagree. The Rhode Island Supreme Court did not replace or otherwise equate Strickland with its own standard, nor do we believe it would have been proper to do so. Rather, fairly read, the Rhode Island Supreme Court's **[**15]** opinion asked, in accordance with Strickland, whether there was a reasonable probability that the trial justice would have granted a mistrial motion. In this case, the answer to that question depended on the state law incurable prejudice standard.

HN11[↑] Under Rhode Island law, as explained above, the incurable prejudice standard governs whether a court should grant a mistrial based on improper prosecutorial comments. When assessing whether a mistrial is warranted in such circumstances, a court must ask whether the comments have caused prejudice that is "inexpiable and incurable by timely instructions." *Ware, 524 A.2d at 1112*. Thus, if Chum's lawyer had moved for a mistrial, the trial justice would have asked whether the comments that formed the basis for the request had caused incurable prejudice.

The Rhode Island Supreme Court's assessment of Strickland prejudice based on a failure to move for a mistrial, therefore, required it to apply the Rhode Island incurable prejudice standard. To determine whether there was a reasonable probability that Chum's trial would have resulted in a different outcome -- a mistrial -- the Rhode Island Supreme Court had to assess the likelihood that a mistrial would have been granted **[**16]** under its own state law. Although the state high court did not explicitly link the two standards in this way, its analysis reveals reliance on that logic. Put differently, to evaluate the likelihood of a different outcome if counsel had performed as Chum insists he should have, the Rhode Island Supreme Court needed to consider -- under Rhode Island law -- what would have happened if counsel had sought a mistrial. To do that, the court needed to apply Rhode Island's incurable prejudice standard to the circumstances of Chum's trial. And that standard required the court to consider not only the prosecutorial error but also the weight of the evidence and curative instructions.[9]

Thus, in assessing whether defense counsel's failure to move for a mistrial prejudiced Chum for purposes of his postconviction ineffective assistance claim, the Rhode Island Supreme Court appropriately considered what it concluded was "overwhelming evidence" of Chum's guilt, as well as the curative instructions the trial justice had given four times over the course of the trial. The state high court held that, in light of these circumstances, the prosecutor's comments had not created incurable prejudice, **[**17]** and thus a mistrial would not have been granted under state law.[10] The Rhode Island Supreme Court **[*448]** did not conclude its analysis by stating explicitly that there is no reasonable probability that, if trial counsel had moved for a mistrial, the outcome of the proceeding would have been different. But it is clear from the court's recitation of the Strickland standard, coupled with its incurable prejudice analysis, that it concluded that there was no reasonable probability that such a motion would have been granted and, thus, the failure to so move could not result in Strickland prejudice. We, therefore, hold that the Rhode Island Supreme Court's use of the incurable prejudice standard did not lead to a decision "contrary to" federal law.

B. "Unreasonable Application" of Strickland

Chum also argues that the Rhode Island Supreme

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[9] To be clear, Chum has not argued that Rhode Island's "incurable prejudice" standard is too high to appropriately gauge whether the prosecutor's improper opening remarks violated his right to a fair trial under the *Due Process Clause*. See, e.g., *Obershaw v. Lanman, 453 F.3d 56, 65 (1st Cir. 2006)* (explaining that a prosecutor's statement may "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process"). Because Chum has raised only an ineffective assistance of counsel claim, rather than a Due Process claim, we do not address the latter.

[10] In his decision denying Chum's petition for postconviction relief based on ineffective assistance of counsel, the trial justice of the Superior Court, who also presided over Chum's trial, stated that he would not have granted a motion for a mistrial if Chum's lawyer had so moved. The Rhode Island Supreme Court cited this as one reason for concluding that Chum had not shown that his lawyer's failure to move for a mistrial had prejudiced him for Strickland purposes. HN12[↑] Strickland makes clear that a reviewing court should not assess the prejudice stemming from trial counsel's deficient performance based on the particular trial judge assigned to the case. Rather, "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision . . . not . . . on the idiosyncrasies of the particular decisionmaker" who presided at the trial level. *Strickland, 466 U.S. at 695*. Thus, the Rhode Island Supreme Court had an obligation to assess whether the relevant state law standard -- here, the incurable prejudice standard governing motions for mistrials -- had been satisfied and whether such a motion was likely to be granted. It could not simply defer to the trial justice's retrospective comment about how he would have handled a motion for a mistrial, if Chum's counsel had so moved. Given the multi-factor analysis employed by the Rhode Island Supreme Court in assessing the incurable prejudice issue, it is clear that the Rhode Island Supreme Court did not simply defer to the trial justice's after-the-fact comment. In other words, it is apparent from the rest of the Rhode Island Supreme Court's analysis that it concluded, from its independent application of the incurable prejudice standard, that a mistrial was not warranted under Rhode Island law.

Court's application of Strickland was unreasonable because there is a reasonable probability that the trial justice would have granted a mistrial if Chum's counsel had moved for one, given the unique power of confession evidence and the otherwise underwhelming evidence against him. We disagree. The Rhode Island Supreme Court held that, in light of **[**18]** the overwhelming evidence against Chum, including three eyewitnesses to the shooting, and the curative instructions given, a mistrial would not have been granted based on Rhode Island's standard for assessing such a motion. Chum disagrees with the court's assessment of the weight of the evidence, but he has not shown why the state high court's analysis was unreasonable.

V.

For the reasons set forth above, we conclude that the Rhode Island Supreme Court's use of the state law incurable prejudice standard did not result in a decision that is contrary to, or an unreasonable application of, the federal standard for assessing prejudice established in Strickland. Accordingly, we affirm the district court's denial of Chum's petition for a writ of habeas corpus.

So ordered.

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APPENDIX B

Chum v. Wall

United States District Court for the District of Rhode Island

October 1, 2018, Decided; October 1, 2018, Filed

C.A. No. 17-541-JJM-LDA

Reporter
2018 U.S. Dist. LEXIS 169119 *; 2018 WL 4696739

YARA CHUM, Petitioner, v. ASHBEL T. WALL, et al., Respondent.

Subsequent History: Affirmed by *Chum v. Coyne-Fague, 2020 U.S. App. LEXIS 2505 (1st Cir. R.I., Jan. 27, 2020)*

Prior History: *State v. Chum, 54 A.3d 455, 2012 R.I. LEXIS 131 (R.I., Oct. 25, 2012)*

Core Terms

state court, confession, assistance of counsel, ineffective, convicted, promise

Counsel: **[*1]** For Yara Chum, Petitioner: Camille A. McKenna, LEAD ATTORNEY, Rhode Island Public Defender, Providence, RI.

For Ashbel T. Wall, Director of the Adult Correctional Institutions, Respondent: Aaron L. Weisman, LEAD ATTORNEY, Attorney General's Office, Providence, RI.

Judges: John J. McConnell, Jr., United States District Judge.Chum

Opinion by: John J. McConnell, Jr.

Opinion

ORDER

Yara Chum is serving a state prison sentence after a Rhode Island Superior Court jury convicted him in 2012 of two counts of felony assault and one count of using a firearm when committing a crime of violence. He is here seeking habeas relief under *28 U.S.C. § 2254*, contending that his constitutional rights were violated; specifically, that he received ineffective assistance of counsel in violation of *Sixth Amendment*. For the reasons below, the Court DENIES habeas relief.

I. FACTS AND PROCEDURAL BACKGROUND

Three men watched from the front porch of a house in Providence while two cars slowly drove by.[1] Emerging from one of the cars, Mr. Chum along with some associates approached the house looking for retribution because a resident of that address had thrown a brick and a tire iron through one of the associate's windows after an attempted drug transaction. Mr. Chum told the associate **[*2]** to shoot the men on the porch. The associate fired one shot, which hit the porch railing, and he and Mr. Chum fled.

Providence Police detectives arrested Mr. Chum, and read him his *Miranda* rights. Mr. Chum agreed to talk to

[1] The Court recites only the bare bone facts here. A more detailed discussion of the facts can be found at *State v. Chum, 54 A.3d 455, 457-60 (R.I. 2012)*.

the police and admitted his role in the shooting.[2] The State charged him with two counts of felony assault with a dangerous weapon, one count of conspiracy to commit assault with a dangerous weapon, one count of carrying a firearm while committing a crime of violence, and one count of discharging a firearm while committing a crime of violence.

Mr. Chum's case went to trial. Before opening statements, the court instructed the jury, "statements of lawyers are not evidence. The only evidence you consider is that which comes in from the witness stand or any exhibits that may be marked as full exhibits." ECF No. 8-3 at 196. During his opening statement, the prosecutor told the jury that he would prove the State's case

> with the defendant's words himself, because, when the detectives came to the Cranston Police Department, they read him his rights and sat down and talked to him. And the defendant told him that he was contacted by [an associate] and told that she needed **[*3]** him to take care of something; that she wanted them to take care of some kid * * * for smashing her windows; that he drove down to [ ] Avenue with [two associates] so that they could point out the house; that he approached the house with a friend, * * * ; that he approached some guys on the porch; that he ordered [an associate] to shoot the guys; that [three other associates] were in a different car waiting around the corner; and that he and [the other associate] fled in separate cars, one red, and one white. You'll hear that. You'll hear about the defendant giving that statement to the Providence Police.

Id. at 204-205; *see also* Chum v. State, No. PM131919, 2014 R.I. Super. LEXIS 163, 2014 WL 6855341, at *2 (R.I. Super. Dec. 1, 2014).

The case proceeded through trial and the prosecutor rested without producing any evidence of the confession he promised in his opening statement. The trial court instructed the jury three additional times during the trial that the lawyer's statements and arguments are not evidence. The court entered judgment of acquittal on the conspiracy count and the State dismissed the charge of carrying a firearm while committing a crime of violence. The jury convicted Mr. Chum on the three remaining counts.

After the Rhode Island Supreme Court affirmed Mr. **[*4]** Chum's conviction, he filed for post-conviction relief in the Rhode Island Superior Court for ineffective assistance of counsel because his lawyer did not move for a mistrial at the close of the State's case when the State failed to produce evidence of his confession. The trial court rejected his arguments in Chum v. State, No. PM131919, 2014 R.I. Super. LEXIS 163, 2014 WL 6855341, which the Rhode Island Supreme Court affirmed. Chum v. State, 160 A.3d 295, 299-300 (R.I. 2017). Mr. Chum then filed the instant Petition for a Writ of Habeas Corpus setting forth a single claim of ineffective assistance of counsel under 28 U.S.C. § 2254. ECF No. 1. The State moved to dismiss the Petition, which the Court denied. *See* Text Order, Apr. 2, 2018. The parties later submitted the trial transcript and further briefing, making the Petition ready for this Court's consideration.

II. STANDARD OF REVIEW

This Court knows that its review of Mr. Chum's case is limited. Both United States Supreme Court precedent, *see e.g.,* Cavazos v. Smith, 565 U.S. 1, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011), and the Congressional mandate in the *Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214*, restrict federal court review of state court convictions and sentences. The AEDPA "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice **[*5]** systems,' not a substitute for ordinary error correction through appeal." Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (Stevens, J., concurring in judgment)).

Under the AEDPA, a state prisoner is entitled to relief where a state court adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[2] Mr. Chum filed a pretrial motion to suppress his statement to police. After an evidentiary hearing, the state court denied the motion, finding that Mr. Chum understood his rights and had given the statement voluntarily. The Rhode Island Supreme Court upheld that decision in affirming Mr. Chum's conviction. *See* State v. Chum, 54 A.3d at 460-62.

28 U.S.C. § 2254(d). A decision is "contrary to" clearly established federal law if the state court "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A decision is an "unreasonable application" of the law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* An unreasonable application of the law is one that is not merely incorrect but also objectively unreasonable. **[*6]** Id. at 410-11. Thus if "it is a close question whether the state decision is in error, then the state decision cannot be an unreasonable application." McCambridge v. Hall, 303 F.3d 24, 36 (1st Cir. 2002).

"Federal habeas review of a state court's factual findings is similarly constrained." Mastracchio v. Vose, 274 F.3d 590, 597 (1st Cir. 2001). Those factual findings control unless Petitioner can show that they were "'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Id. at 597-98 (quoting 28 U.S.C. § 2254(d)(2)). The Petitioner bears "the burden of rebutting the presumption or correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

III. MR. CHUM'S CLAIM FOR RELIEF

The Sixth Amendment to the United States Constitution entitles a defendant to effective assistance of counsel in all criminal proceedings, but "[t]he Constitution guarantees only an 'effective defense, not necessarily a perfect defense or a successful defense.'" Peralta v. United States, 597 F.3d 74, 79 (1st Cir. 2010) (quoting Scarpa v. Dubois, 38 F.3d 1, 8 (1st Cir. 1994)). The governing legal standard in an ineffective assistance of counsel claim is set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, a defendant must establish two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show **[*7]** that the deficient performance prejudiced the defense.

Ouber v. Guarino, 293 F.3d 19, 25 (1st Cir. 2002) (quoting Strickland, 466 U.S. at 687). The first element allows a finding of deficient performance "[o]nly if, 'in light of all the circumstances, the [alleged] acts or omissions of counsel were outside the wide range of professionally competent assistance,' can a finding of deficient performance ensue." *Id.* (quoting Strickland, 466 U.S. at 690). "The second *Strickland* element ensures that, even if a lawyer's performance is constitutionally unacceptable, relief will be withheld unless the quondam client has demonstrated that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting Strickland, 466 U.S. at 694). "Reviewing courts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and represents sound trial strategy." Jewett v. Brady, 634 F.3d 67, 75 (1st Cir. 2011) (quoting Strickland, 466 U.S. at 689).

Mr. Chum argues that his trial counsel was ineffective because he failed to move for a mistrial after the prosecutor promised the jury evidence of his confession during his opening statement, but never produced the evidence. In his view, the State's failure to live up to that promise guaranteed Mr. Chum's conviction because **[*8]** the state court deprived him of the opportunity to cross-examine testimony about the confession, leaving it untested and unchallenged in the jury's mind.

There is no doubt that Mr. Chum's counsel's failure to move for a mistrial, or at the very least argue to the jury about the prosecution's unfilled promise of evidence of a confession, was "outside the wide range of professionally competent assistance," and represents a constitutionally deficient performance by Mr. Chum's trial counsel. Strickland, 466 U.S. at 690. A confession is unique in its powerful and persuasive effect on a jury's determination of guilt. Failure by a defense attorney not to challenge in some way the fact that the prosecution did not present evidence of the referenced confession is, without a doubt, seriously deficient representation.

The State focuses its objection to the Petition on the prejudice prong of the *Strickland* test, arguing that there is not a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The State argues that Mr. Chum's counsel's omission at trial did not prejudice Mr. Chum because the jury would have still convicted him because of the overwhelming **[*9]** strength of the

admitted evidence against him.

In reviewing this habeas Petition, the Court is not independently deciding whether Mr. Chum has met the second element of the *Strickland* test, but whether the state court's determination that there was no prejudice "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement." Tran v. Roden, 847 F.3d 44, 49 (1st Cir. 2017) (internal quotations and brackets omitted). Federal habeas relief is precluded "so long as 'fairminded jurists could disagree' on the correctness of [the state court's] decision." Harrington, 131 S. Ct. at 786 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)).

Turning to the Rhode Island Supreme Court's opinion, it considered Mr. Chum's argument and concluded that the unfulfilled promise of the confession evidence did not amount to incurable prejudice under the *Strickland* standard. Though the court was critical when it determined that Mr. Chum's trial counsel failed in his representation, it ultimately found that his lawyer's failure was not prejudicial because of the overwhelming evidence against him, specifically that the jury heard "three eyewitness identifications of Chum from the three men [. . .] who were at the household when the **[*10]** shooting occurred." Chum v. State, 160 A.3d at 300. The state court reasoned that the jurors had the information about the eyewitnesses' criminal backgrounds and were in the best position to assess the witnesses' credibility and the truthfulness of their identifications. Given the eyewitness testimony, the state court found, it was likely that the jury would have convicted Mr. Chum regardless of the missing confession evidence.

The state court also based its finding on the fact that "the trial justice instructed the jury on numerous occasions that the arguments of counsel were not evidence," instructions that were "proper" and that the jury was "presume[d to have] . . . follow[ed]." *Id.; see* Richardson v. Marsh, 481 U.S. 200, 206, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987) (finding that there is an "almost invariable assumption" in the law that juries follow instructions). The Rhode Island Supreme Court considered the trial court's four cautionary instructions to the jurors and found that they communicated that directive to them.[3]

After a thorough review of the trial transcript, state court opinions, briefing, and excellent oral advocacy by attorney for both parties, this Court finds that the Rhode Island Supreme Court's decision that the weight of the evidence and the cautionary instructions **[*11]** made Mr. Chum's lawyer's failure to move for a mistrial not prejudicial is neither contrary to, nor an unreasonable application of established federal law to the facts as that court found them. *See* Mastracchio, 274 F.3d at 597-98 (quoting 28 U.S.C. § 2254(d)(2)) (where issues of fact that the state court decided control unless they were "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.") The state court's decision that the result of Mr. Chum's trial would not have been different was reasonable. *See* Harrington, 562 U.S. at 109 ("In light of the record here there [is] no basis to rule that the state court's determination was unreasonable."). It was neither "contrary to," nor an "unreasonable application of," clearly established federal law as determined by the United States Supreme Court in *Strickland*. 28 U.S.C. § 2254(d)(1). Moreover, even if this Court thought that Mr. Chum met the second element of *Strickland*, and that the state court was wrong in its conclusion, the record is such that fair-minded jurists could disagree (*see* Tran, 847 F.3d at 49) and thus Mr. Chum is not entitled to federal habeas relief.

The Court DENIES and dismisses Mr. Chum's Petition for a Writ of Habeas Corpus.

IT IS SO ORDERED.

/s/ John J. McConnell, Jr.

John J. **[*12]** McConnell, Jr.

United States District Judge

October 1, 2018

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[3] "[T]he four cautionary instructions that the trial justice gave to the jury were: (1) "I tell you now, and I probably will remind you before this case is over, the statements of lawyers are not evidence"; (2) "I told you before we started, ladies and gentlemen, that the statements of lawyers are not evidence"; (3) "I told the jury earlier, when we started this trial, that statements are [sic] lawyers are not evidence"; and (4) "Counsel will now address you, and I, again, remind you of what I said before, and that is that their statements and their arguments are not evidence. If the lawyer says something that doesn't correlate with your memory, it's your memories that count, not the memories of counsel." Chum v. State, 160 A.3d at 298 n.5.

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APPENDIX C

Chum v. State

Supreme Court of Rhode Island

May 23, 2017, Decided; May 23, 2017, Filed

No. 2015-43-Appeal.

Reporter
160 A.3d 295 *; 2017 R.I. LEXIS 65 **; 2017 WL 2268883

Yara Chum v. State of Rhode Island.

Prior History: [1]** Providence County Superior Court. (PM 13-1919). Associate Justice Robert D. Krause.

Chum v. State, 2014 R.I. Super. LEXIS 163 (Dec. 1, 2014)

Core Terms

opening statement, trial justice, post conviction relief, trial attorney, mistrial, ineffective assistance of counsel, introduce

Case Summary

Overview
HOLDINGS: [1]-Petitioner argued that the prosecutor's reference to an admission in an opening statement and subsequent failure to introduce it into evidence amounted to incurable prejudice; [2]-However, there was no prejudice because the evidence of petitioner's complicity in this joint venture was overwhelming; [3]-Furthermore, although counsel did not request a curative instruction, the trial justice instructed the jury on numerous occasions that the arguments of counsel were not evidence; [4]-Counsel's failure to move for a mistrial was not prejudicial because the trial justice stated that he would not have granted a mistrial in any event; [5]-Thus, petitioner failed to meet his burden of establishing ineffective assistance of counsel under the Sixth Amendment entitling him to postconviction relief.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions for Postconviction Relief

Criminal Law & Procedure > Appeals > Standards of Review > Deferential Review

HN1[] **Standards of Review, De Novo Review**

When reviewing an application for postconviction relief, the appellate court will not impinge upon the fact-finding function of a hearing justice absent clear error or a showing that the hearing justice overlooked or misconceived material evidence in arriving at those findings. The appellate court reviews de novo questions of fact or mixed questions of law and fact pertaining to an alleged violation of an applicant's constitutional rights. Even when employing a de novo review, the appellate court still accords a hearing justice's findings of historical fact, and inferences drawn from those facts,

great deference.

Criminal Law & Procedure > Postconviction Proceedings

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN2 **Criminal Law & Procedure, Postconviction Proceedings**

Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth by the United States Supreme Court in Strickland v. Washington. Under the first prong of this analysis, an applicant for postconviction relief first must establish that counsel's performance was constitutionally deficient; this requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. This prong can be satisfied only by a showing that counsel's representation fell below an objective standard of reasonableness. Under the second prong of Strickland, an applicant must demonstrate prejudice emanating from the attorney's deficient performance such as to amount to a deprivation of the applicant's right to a fair trial. This prong is satisfied only when an applicant demonstrates that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Criminal Law & Procedure > Trials > Opening Statements

Criminal Law & Procedure > Appeals > Reversible Error > Prosecutorial Misconduct

HN3 **Trials, Opening Statements**

The general rule is that a prosecutor's remarks during opening statements do not constitute reversible error unless incurable prejudice is shown.

Criminal Law & Procedure > Trials > Closing Arguments

Criminal Law & Procedure > Trials > Opening Statements

Criminal Law & Procedure > Trials > Motions for Mistrial

Criminal Law & Procedure > Trials > Jury Instructions > Curative Instructions

HN4 **Trials, Closing Arguments**

When a prosecutor makes an unfulfilled promise in opening statement about the evidence that will be put before the jury, a criminal defendant has several avenues available to address the issue. Specifically, the trial attorney can: (1) remind the jury during closing argument that the prosecutor promised that certain evidence would be admitted and that the evidence never materialized; (2) seek a mistrial; or (3) request a curative instruction.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Ability to Follow Instructions

Criminal Law & Procedure > Trials > Jury Instructions > Cautionary Instructions

HN5 **Jury Deliberations, Ability to Follow Instructions**

It is well settled that the court presumes that the jury follows a trial justice's adequate cautionary instruction.

Counsel: For Applicant: Camille A. McKenna, Office of the Public Defender.

For State: Aaron L. Weisman, Department of Attorney General.

Judges: Present: Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia, JJ.

Opinion by: Indeglia

Opinion

[*296] Justice Indeglia, for the Court. Yara Chum (Chum or applicant), appeals the denial of his application for postconviction relief. This case came before the Supreme Court on May 2, 2017, pursuant to an order directing the parties to appear and show cause why the issues raised in this appeal should not be summarily decided. After hearing the arguments of counsel and reviewing the memoranda of the parties, we are satisfied that cause has not been shown. Accordingly, we shall decide the appeal at this time without further briefing or argument. For the reasons set forth herein, we affirm the judgment of the Superior Court.

I

Facts and Travel

The facts underlying this case are set forth in *State v. Chum, 54 A.3d 455, 457 (R.I. 2012)*, where this Court affirmed Chum's conviction for two felony counts of assault with a dangerous weapon and one count of discharging a firearm while committing a crime of violence. Distilled to its essence, this case involves **[**2]** "a drug deal gone awry." Id. On March 1, 2009, Frances Meseck, Jr. met Matthew DePetrillo to sell him marijuana. DePetrillo, accompanied by another man, entered Meseck's car. While examining the marijuana, DePetrillo's companion jumped out of the vehicle and ran off with it. While Meseck drove after the companion, DePetrillo jumped out of the vehicle.

In an attempt to avenge the thievery, Meseck and his friend, James Monteiro, vandalized the home of DePetrillo's friend, Erin Murray. Upon learning about the vandalism, DePetrillo called Meseck and threatened "to kick in [his] door with a .44 and shoot [him]." Meseck called the other residents of his household, Monteiro, **[*297]** James McArdle, and Lorenzo Saraceno, to warn them of DePetrillo's threat. Sitting outside on the house's porch, Monteiro, McArdle, and Saraceno observed two Asian males approach, who were later identified as Chum and Samnang Tep. After the two groups exchanged words, Chum told Tep to shoot the men and Tep fired a shot at the porch, which hit the porch railing. Tep and Chum then fled the scene.

Chum was subsequently charged with two counts of felony assault with a dangerous weapon, one count of conspiracy to commit assault **[**3]** with a dangerous weapon, one count of carrying a firearm while committing a crime of violence, and one count of discharging a firearm while committing a crime of violence.[1] After a Providence Superior Court jury found Chum guilty, the trial justice sentenced him to ten years on each of the felony assault counts, to be served concurrently, and ten years on the firearm count, to be served consecutively with five years to serve and five years suspended, with probation.

On April 16, 2013, Chum filed a pro se application for postconviction relief, and counsel was thereafter appointed. In support of his application, Chum argued that he had ineffective assistance of counsel because his trial attorney failed to move for a mistrial after the state mentioned Chum's statement to the police during its opening statement, but did not introduce it into evidence.[2] Specifically, Chum referenced the following statement by the prosecutor:

> "I told you we'd prove this case with witnesses; we'd also prove it with the defendant's words himself, because, when the detectives came to the Cranston Police Department, they read him his rights and sat down and talked to him. And the defendant told him that he **[**4]** was contacted by Erin [Murray] and told that she needed him to take care of something; that she wanted them to take care of some kid named Frankie for smashing her windows; that he drove down to Peach Avenue with Matthew DePetrillo and Erin [Murray] so that they could point out the house; that he approached the house with a friend, Vang Chhit; that he approached some guys on the porch; that he ordered Chhit to shoot the guys; that Erin [Murray], Matthew DePetrillo and Samnang Tep were in a different car waiting around the corner; and that he and Chhit fled in separate cars, one red, and one

[1] After the state rested its case, the trial justice sua sponte entered a judgment of acquittal pursuant to Rule 29(a)(1) of the Superior Court Rules of Criminal Procedure on the conspiracy count. The state dismissed, under Rule 48(a) of the Superior Court Rules of Criminal Procedure, the count of carrying a firearm while committing a crime of violence.

[2] We note that Chum filed a pretrial motion to suppress the statement he made to the police following his arrest. After a hearing on that motion, the trial justice denied it, finding that Chum voluntarily and freely spoke to the police.

white. You'll hear that. You'll hear about the defendant giving that statement to the Providence Police."[3]

On December 1, 2014, the same trial justice entered a judgment and a written decision that denied Chum's postconviction-relief application.[4] He rejected the argument that Chum had ineffective assistance of counsel because of his trial attorney's **[*298]** failure to seek a mistrial or a curative instruction after the prosecutor's comment during the state's opening statement. The trial justice found this assertion meritless because the prosecutor's statement was not made in bad faith. Additionally, the trial **[**5]** justice noted that he gave cautionary instructions to the jury on four occasions.[5] The trial justice stated that, regardless, he would not have granted a mistrial even if the trial attorney had requested one. Accordingly, the trial justice concluded that "[g]iven the overwhelming other evidence of Chum's guilt, coupled with this Court's repeated cautionary admonitions to the jury, trial counsel's purported error, if it was error at all, does not satisfy the high [*Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]* standard."

The applicant appealed to this Court on December 16, 2014.[6] On appeal, Chum maintains that the trial justice erred in denying his application for postconviction relief because he had ineffective assistance of counsel. In support of this contention, Chum submits that his trial attorney failed to act when the prosecutor discussed Chum's statement to the police during the state's opening statement but did not introduce it into evidence.[7] Chum maintains that this deficiency prejudiced him in his trial and conviction.

II

Standard of Review

HN1[↑] When we review an application for postconviction relief, "[t]his Court will not impinge upon the fact-finding function of a hearing justice * * * absent clear error or a showing that the **[**6]** [hearing] justice overlooked or misconceived material evidence in arriving at those findings." *Tempest v. State, 141 A.3d 677, 682 (R.I.)*, reargument denied, *150 A.3d 179 (R.I. 2016)* (quoting *State v. Thornton, 68 A.3d 533, 539 (R.I. 2013))*. We review de novo "questions of fact or mixed questions of law and fact pertaining to an alleged violation of an applicant's constitutional rights **[*299]** * * * ." Id. (quoting *Thornton, 68 A.3d at 539*). Even when employing a de novo review, "we still accord a hearing justice's findings of historical fact, and inferences drawn from those facts, great deference * * * ." Id. (quoting *Thornton, 68 A.3d at 540*).

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[3] The state's evidence at trial demonstrated that Tep was the shooter, despite the prosecutor's comment that Chum's statement identified Chhit as the shooter. *State v. Chum, 54 A.3d 455, 459 n.4 (R.I. 2012)*.

[4] The parties waived a hearing and oral argument, so the trial justice decided the matter on the "pleadings."

[5] Specifically, the four cautionary instructions that the trial justice gave to the jury were: (1) "I tell you now, and I probably will remind you before this case is over, the statements of lawyers are not evidence"; (2) "I told you before we started, ladies and gentlemen, that the statements of lawyers are not evidence"; (3) "I told the jury earlier, when we started this trial, that statements are [sic] lawyers are not evidence"; and (4) "Counsel will now address you, and I, again, remind you of what I said before, and that is that their statements and their arguments are not evidence. If the lawyer says something that doesn't correlate with your memory, it's your memories that count, not the memories of counsel."

[6] We note that, on June 19, 2015, *G. L. 1956 § 10-9.1-9* was amended to require a party seeking review of a final judgment entered in a post-conviction relief proceeding to file a petition for writ of certiorari to this Court.

[7] In Chum's application for postconviction relief, he raised additional arguments alleging ineffective assistance of counsel that he does not press on appeal. Specifically, he cites his trial attorney's failure to: move for a judgment of acquittal pursuant to Rule 29; object to the trial justice's instruction on the count of aiding and abetting; and move to reduce his sentence pursuant to Rule 35 of the Superior Court Rules of Criminal Procedure.

In the trial justice's decision, he found that Chum was not prejudiced by the trial attorney's failure to move for a judgment of acquittal because the trial justice raised it sua sponte. With respect to Chum's challenge to the aiding-and-abetting instruction, the trial justice noted that it was both "permissible" and "commonplace" to include that instruction. He determined that the trial attorney's failure to move to reduce Chum's sentence was not ineffective assistance of counsel because the attorney was appointed for trial, not for postconviction or postsentencing matters and, nevertheless, he would not have granted such a motion.

III

Discussion

It is well settled that *HN2*[↑] claims of ineffective assistance of counsel are evaluated under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Under the first prong of this analysis, "an applicant for postconviction relief first 'must establish that counsel's performance was constitutionally deficient; [t]his requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed * * * by the *Sixth Amendment*.'" *Reyes v. State, 141 A.3d 644, 654 (R.I. 2016)* (quoting *Bido v. State, 56 A.3d 104, 110-11 (R.I. 2012))*. "This prong can be satisfied only by a showing that counsel's representation fell below an objective standard of reasonableness." *Lipscomb v. State, 144 A.3d 299, 308 (R.I. 2016)* (quoting *Bell v. State, 71 A.3d 458, 460 (R.I. 2013))*. Under the second prong of Strickland, an applicant must "demonstrate prejudice emanating from the **[**7]** attorney's deficient performance such as to amount to a deprivation of the applicant's right to a fair trial." *Lipscomb, 144 A.3d at 308* (quoting *Bell, 71 A.3d at 460*). "This prong is satisfied only when an applicant demonstrates that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (quoting *Bell, 71 A.3d at 460*).

HN3[↑] The "general rule" is that "a prosecutor's remarks during opening statements 'do not constitute reversible error unless incurable prejudice is shown.'" *State v. Perry, 779 A.2d 622, 628 (R.I. 2001)* (quoting *State v. Micheli, 656 A.2d 980, 982 (R.I. 1995))*; see also *State v. Ware, 524 A.2d 1110, 1112-13 (R.I. 1987)* (concluding that there was no incurable prejudice by the prosecutor's opening statement that referenced a witness who did not testify because the prosecutor did not act in bad faith and there was "ample independent evidence" to find the defendant guilty). Chum maintains, however, that his trial attorney's inaction in response to the prosecutor's opening statement "fell below the objective standard of reasonableness and prejudiced the defense * * * ."

As we acknowledged in Chum's direct appeal, *HN4*[↑] "when, as in this case, a prosecutor makes an unfulfilled promise in opening statement about the evidence that will be put before the jury, a criminal defendant has several avenues available **[**8]** to address the issue." *Chum, 54 A.3d at 461*. Specifically, the trial attorney can: (1) "remind the jury during closing argument that the prosecutor promised that certain evidence would be admitted and that the evidence never materialized"; (2) seek a mistrial; or (3) request a curative instruction. Id. Chum asserts that his trial attorney's failure to use any of these available recourses constituted ineffective assistance of counsel. While this Court previously acknowledged that Chum's trial attorney failed to utilize any of these three potential remedies, we nevertheless find no error in the trial justice's determination that the attorney's failure did not meet the requirements of the *Strickland* test.

Without any Rhode Island jurisprudence squarely addressing the narrow issue before us—that being whether a prosecutor's **[*300]** reference to an admission in an opening statement and subsequent failure to introduce it into evidence amounts to incurable prejudice—Chum cites cases from our sister states on the issue. See generally *Hayes v. State, 932 So.2d 381 (Fla. Dist. Ct. App. 2006)*; *People v. Tenny, 224 Ill. App. 3d 53, 586 N.E.2d 403, 166 Ill. Dec. 445 (Ill. App. Ct. 1991)*. The cases cited, however, are distinguishable from the instant matter. See *Hayes, 932 So.2d at 382* (The District Court of Appeal of Florida concluded that the prosecutor's opening-statement reference to the **[**9]** defendant's confession and subsequent failure to introduce it into evidence was error where there was no physical evidence that implicated the defendant.); *Tenny, 586 N.E.2d at 409, 412* (During opening statements, the prosecutor referenced the defendant's statement to the police, which prompted the defendant's attorney to discuss the statement and certain facts therein. The Appellate Court of Illinois deemed the prosecutor's failure to introduce the statement prejudicial because the prosecutor's closing argument referred to the defense attorney's comments as concessions.).

Here, however, there was no prejudice because, as the trial justice correctly found, "[t]he evidence of Chum's complicity in this joint venture was overwhelming." There were three eyewitness identifications of Chum from the three men (McArdle, Saraceno, and Monteiro) who were at the household when the shooting occurred.[8] Additionally, although the trial attorney did

[8] Chum maintains that the evidence against him was "hardly overwhelming" because it relied on the aforementioned eyewitness cross-racial identifications from three witnesses who had criminal records. We note that Chum concedes that

not request a curative instruction, the trial justice instructed the jury on numerous occasions that the arguments of counsel were not evidence. Despite Chum's assertion that these instructions were inadequate to lessen the harm of the prosecutor's opening statement, this Court previously **[**10]** deemed them to be proper. *Chum, 54 A.3d at 461*. Further, ***HN5***[ ] "[i]t is well settled that this Court presumes that the jury follows a trial justice's adequate cautionary instruction." Id. Finally, the trial attorney's failure to move for a mistrial was not prejudicial because the trial justice, in denying Chum's application for postconviction relief, stated that he would not have granted a mistrial even if the attorney had so moved. Accordingly, Chum has failed to meet his burden of establishing ineffective assistance of counsel entitling him to postconviction relief.

IV

Conclusion

For the reasons set forth in this opinion, we affirm the judgment of the Superior Court. The record may be remanded to that tribunal.

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his trial attorney did not challenge the identification procedure, and moved to pass his motion to suppress the identifications.

APPENDIX D

Positive
As of: June 14, 2020 7:28 PM Z

Chum v. State

Superior Court of Rhode Island, Providence

December 1, 2014, Filed

NO. PM/13-1919 (P2/09-3192 BG)

Reporter
2014 R.I. Super. LEXIS 163 *

YARA CHUM VS. STATE OF RHODE ISLAND

Subsequent History: Affirmed by Chum v. State, 160 A.3d 295, 2017 R.I. LEXIS 65 (R.I., May 23, 2017)

Prior History: State v. Chum, 54 A.3d 455, 2012 R.I. LEXIS 131 (R.I., Oct. 25, 2012)

Core Terms

aiding and abetting, opening statement, post-conviction, credible, mistrial, guilt

Case Summary

Overview

HOLDINGS: [1]-Petitioner inmate was not entitled to R.I. Gen. Laws § 10-9.1-1 et seq. post-conviction relief for counsel's failure to seek a mistrial or curative instruction when the State did not present evidence promised in opening statement because evidence of guilt was overwhelming, and the jury was told the statement was not evidence; [2]-Counsel's incorrect statement of an R.I. Super. Ct. R. Crim. P. 29 motion's basis did not entitle the inmate to relief because acquittal of conspiracy was granted, sua sponte, an aiding and abetting instruction applied a recognized theory, and a claim of insufficient aiding and abetting evidence was not made on appeal, nor was the evidence insufficient; [3]-Counsel's failure to move to reduce the inmate's sentence under R.I. Super. Ct. R. Crim. P. 35 did not allow relief because it was not, alone, ineffective, and counsel was not so appointed.

Outcome
Petition denied.

LexisNexis® Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN1 Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

The benchmark for a claim of ineffective assistance of counsel is Strickland v. Washington, which the Rhode Island Supreme Court has adopted. Whether an attorney has failed to provide effective assistance is a factual question which a post-conviction relief petitioner bears the "heavy burden" of proving. Strickland presents a high bar to surmount.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN2 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

When reviewing a claim of ineffective assistance of counsel, the inquiry is whether counsel's conduct so undermined the proper functioning of the adversarial process that a trial cannot be relied on as having produced a just result. A Strickland claim presents a two-part analysis. First, a petitioner must demonstrate that counsel's performance was deficient. That test requires a showing that counsel made errors that were so serious that the attorney was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. The Sixth Amendment standard for effective assistance of counsel, however, is "very forgiving," and a strong (albeit rebuttable) presumption exists that counsel's performance was competent. Even if a post-conviction petitioner can satisfy the first part of the test, he or she must still pass another sentry embodied in Strickland by demonstrating that his or her attorney's deficient performance "prejudiced" his or her defense. Thus, he or she is obliged to show that a reasonable probability exists that but for the deficiency the outcome of the trial would have been different.

Criminal Law & Procedure > Trials > Opening Statements

HN3 **Trials, Opening Statements**

A prosecutor is entitled, during opening statements, to comment on evidence the prosecutor believes in good faith will be available and admissible.

Criminal Law & Procedure > Trials > Opening Statements

HN4 **Trials, Opening Statements**

A prosecutor is entitled to tell a jury, in opening statement, what he or she intends to prove. If the prosecution is unable to prove what has been promised, it will lose credibility with the jury and the defendant will benefit.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Ability to Follow Instructions

Criminal Law & Procedure > Trials > Jury Instructions > Cautionary Instructions

HN5 **Jury Deliberations, Ability to Follow Instructions**

It is well settled that a reviewing court presumes that a jury follows a trial justice's adequate cautionary instruction.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

HN6 **Accessories, Aiding & Abetting**

It is permissible, indeed commonplace, to include an aiding and abetting instruction even though a defendant is charged as a principal.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Res Judicata

HN7 **Criminal Law & Procedure, Postconviction Proceedings**

See R.I. Gen. Laws § 10-9.1-8.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Res Judicata

HN8 **Criminal Law & Procedure, Postconviction Proceedings**

R.I. Gen. Laws § 10-9.1-8 codifies the doctrine of res judicata as applied to petitions for post-conviction relief. Res judicata bars the relitigation of any issue that could have been litigated in a prior proceeding, including a direct appeal, that resulted in a final judgment between

the same parties or those in privity with them.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN9[] **Accessories, Aiding & Abetting**

See *R.I. Gen. Laws § 11-1-3*.

Counsel: **[*1]** For Plaintiff: Therese M. Caron, Esq.

For Defendant: Jeanine P. McConaghy, Esq.

Judges: KRAUSE, J.

Opinion by: KRAUSE

Opinion

DECISION

KRAUSE, J. Petitioner Yara Chum has filed an application for post-conviction relief pursuant to *R.I.G.L. § 10-9.1-1 et seq*., claiming that his convictions after a jury trial for felony assaults with a firearm should be vacated. He contends that the jury's adverse verdict resulted from prejudicially deficient efforts by his trial attorney. The Court disagrees.

The factual underpinnings of the criminal case are fully set forth in the Supreme Court's decision affirming Chum's convictions. *State v. Chum, 54 A.3d 455 (R.I. 2012)*. To the extent necessary, some of those facts will be referenced herein. Counsel in this application have waived a hearing and oral argument, submitting the case to the Court on the pleadings and the record below. For the reasons stated herein, the Court finds Chum's petition without merit.

* * *

HN1[] The benchmark for a claim of ineffective assistance of counsel is *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, which has been adopted by our state Supreme Court. *Brown v. Moran, 534 A.2d 180, 182 (R.I. 1987)*; *LaChappelle v. State, 686 A.2d 924, 926 (R.I. 1996)*. Whether an attorney has failed to provide effective assistance is a factual question which petitioner bears the "heavy burden" of proving. *Crombe v. State, 607 A.2d 877 (R.I. 1992)* (citing *Pope v. State, 440 A.2d 719, 723 (R.I. 1982))*; *Ouimette v. State, 785 A.2d 1132, 1139 (R.I. 2001)*. Strickland presents "a high bar to surmount." *Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)*.

HN2[] When reviewing **[*2]** a claim of ineffective assistance of counsel, the inquiry is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Heath v. Vose, 747 A.2d 475, 478 (R.I. 2000)*. A Strickland claim presents a two-part analysis. First, the petitioner must demonstrate that counsel's performance was deficient. That test requires a showing that counsel made errors that were so serious that the attorney was "not functioning as the counsel guaranteed the defendant by the *Sixth Amendment*." *Strickland, 466 U.S. at 687*; *Powers v. State, 734 A.2d 508, 521 (R.I. 1999)*. The *Sixth Amendment* standard for effective assistance of counsel, however, is "very forgiving." *United States v. Theodore, 468 F.3d 52, 57 (1st Cir. 2006)*, quoting *Delgado v. Lewis, 223 F.3d 976, 981 (9th Cir. 2000)*, and "a strong (albeit rebuttable) presumption exists that counsel's performance was competent." *Gonder v. State, 935 A.2d 82, 86 (R.I. 2007)*.

Even if the petitioner can satisfy the first part of the test, he must still pass another sentry embodied in Strickland by demonstrating that his attorney's deficient performance "prejudiced" his defense. Thus, he is obliged to show that a reasonable probability exists that but for the deficiency the outcome of the trial would have been different. *Strickland, 466 U.S. at 694*; *Crombe, 607 A.2d at 878*. Chum cannot clear either hurdle.

I. Failure to Request Mistrial or Curative Instruction

Chum's principal complaint targets his trial attorney's **[*3]** failure to request a mistrial or a curative instruction when the prosecutor completed the state's case without having presented evidence he had

referenced in his opening statement to the jury. The state's attorney told the jurors that a Cranston detective would recount Chum's statement after he had been arrested. The prosecutor said:

> "[W]e'd also prove it with the defendant's words himself, because, when the detectives came to the Cranston Police Department, they read him his rights and sat down and talked to him. And the defendant told him that he was contacted by Erin Peterson and told that she needed him to take care of something; that she wanted them to take care of some kid named Frankie for smashing her windows; that he drove down to Peach Avenue with Matthew DePetrillo and Erin Peterson so that they could point out the house; that he approached the house with a friend, Vang Chhit; that he approached some guys on the porch; that he ordered Chhit to shoot the guys; that Erin Peterson, Matthew DePetrillo and Samnang Tep were in a different car waiting around the corner; and that he and Chhit fled in separate cars, one red, and one white. You'll hear that. You'll hear about the defendant **[*4]** giving that statement to the Providence Police." Tr. II at 204-205.

The state concluded its case without offering Chum's statement. He now complains that in the absence of that evidence trial counsel's failure to request a mistrial or a curative instruction constituted such ineffective assistance of counsel that he is entitled to a new trial. He is mistaken.

If the prosecutor's reference to the defendant's statement had been made without any basis or in bad faith, Chum's claim might have some merit. See *State v. Ware, 524 A.2d 1110, 1112 (R.I. 1987)* (prosecutor must have a good faith and reasonable basis that the evidence referred to in the opening statement is admissible). Here, however, no bad faith exists. The admissibility of the defendant's statement was the subject of a pretrial suppression motion which he litigated without success. That evidence was therefore fully available to the state if it decided to use it. In *State v. Usenia, 599 A.2d 1026, 1032 (R.I. 1991)*, the Court said:

> *HN3*[↑] "The prosecutor is entitled, during opening statements, to comment on evidence the prosecutor believed in good faith will be available and admissible. See ABA Standards for Criminal Justice, ch. 3, standard 3-5.5 (1979). The incriminating evidence mentioned was a metal-tipped stick and a roll of **[*5]** pennies from the Pizza Man Restaurant that were recovered in the car. The prosecutor was justified at that time in believing that these relevant items would be admitted into evidence. *HN4*[↑] The prosecutor is entitled to tell the jury what he intends to prove. If the prosecution is unable to prove what has been promised, it will lose credibility with the jury and defendant will benefit."

The record is silent as to the reason the state decided not to present Chum's inculpatory statement. In any event, the state's case unfolded with compelling force without it. Chum elected not to testify, and he did not present a defense.

Although Chum's attorney could have made requests for a mistrial or a curative instruction, failure to have done so in the face of overwhelming evidence of guilt is not fatal error. *State v. Perry, 779 A.2d 622, 627-28 (R.I. 2001)*. In Perry, the prosecutor announced to the jury that Perry "couldn't keep his mouth shut" and had told a jailhouse informant, whom the state would present during the trial, how he had "smoked that nigger, how he shot him with his automatic." The state rested without presenting that witness. It did, however, present other significant evidence of Perry's guilt, including an eyewitness to the shooting. **[*6]**

So too, in the instant case the state presented three witnesses who positively identified Chum and who testified that after having had sharp words with one of several men on a house porch only fifteen feet away, Chum had ordered his cohort, Samnang Tep, to shoot them. In response to Chum's command, Tep immediately drew his weapon and fired at them, striking the porch railing but none of the people. Both Chum and Tep then fled on foot but were apprehended together later in the evening.

The eyewitness identifications were never challenged in any pretrial motion, and those witnesses were firm and convincing during trial. In assessing their credibility at Chum's motion for a new trial, this Court found their testimony entirely credible. The Court renews that sentiment here.

The evidence of Chum's complicity in this joint venture was overwhelming. The prosecutor's unfulfilled promise to present Chum's incriminating statement was, in this Court's view as a front-row observer, of no moment at all. No mistrial would have been granted if requested, and the Court admonished the jury on several occasions that statements of counsel were not evidence. At the

very outset of the trial, prior to the **[*7]** prosecutor's opening statement, the Court stated:

> "We begin the case, ladies and gentlemen, with the opening statement of [the prosecutor]. It's an opportunity for him to give you a bit of an overview of the trial and the case that will be unfolding. . . . I tell you now, and I probably will remind you before this case is over, the statements of lawyers are not evidence. The only evidence you consider is that which comes in from the witness stand or any exhibits that may be marked as full exhibits." Tr. II at 196.

On three more occasions, the Court did remind the jurors of that admonition. (Tr. II at 214-15, 307, 344) Those cautionary instructions were deemed fully satisfactory by the Supreme Court when it affirmed Chum's conviction:

> "To be sure, the prosecutor referred to defendant's statement in his opening statement to the jury. Although defendant desperately clings to this fact, it affords him no harbor because statements of counsel are not evidence. See *State v. Tevay, 707 A.2d 700, 702 (R.I. 1998)*. The record discloses that the trial justice instructed the jury before the opening statements and again at closing arguments that statements of counsel were not evidence. ***HN5***[] It is well settled that this Court presumes that the jury **[*8]** follows a trial justice's adequate cautionary instruction. . . . The trial justice's instructions in this case plainly were adequate." *Chum, 54 A.3d at 461. (Citation omitted.)*

Given the overwhelming other evidence of Chum's guilt, coupled with this Court's repeated cautionary admonitions to the jury, trial counsel's purported error, if it was error at all, does not satisfy the high Strickland standard.[1] A review of the record in this case leads to the same conclusion the Supreme Court reached in *State v. Anderson, 878 A.2d 1049, 1050 (R.I. 2005)*: "The conviction in this case was not a result of petitioner's attorney but, rather, the weight of the credible evidence against [him]." See *Perry, 779 A.2d at 628* ("Thus, wholly apart from [the witness'] failure to testify . . ., the independent evidence pointing to Perry's guilt was both compelling and overwhelming."); *Ware, 524 A.2d at 1113* ("ample independent evidence to find defendant guilty").

II. The Rule 29 Motion

A. Trial Counsel's Misstatement of the Law

Chum also criticizes his trial attorney **[*9]** for his mistaken explication of a motion for judgment of acquittal pursuant to Rule 29, Super. R. Crim. P. Although trial counsel recited an incorrect basis for such a motion, the Court nonetheless exercised its prerogative under Rule 29(a)(1) and, on its own motion, granted Chum a judgment of acquittal on the conspiracy count. Plainly, no prejudice inured to Chum when the Court sua sponte accorded him that benefit regardless of his lawyer's misstatements. As Chum concedes, "[T]he Court covered the attorney." (Brief at p. 12.)

B. Aiding and Abetting

Chum further complains that he was unfairly subjected to criminal liability without fair notice when, after jettisoning the conspiracy count, the Court purportedly "added" a count of aiding and abetting. (Brief at p. 14.) That contention is without basis. No extra count was "added;" rather, a well-recognized theory of liability was simply applied to the case. *State v. Graham, 941 A.2d 848, 857-58 (R.I. 2008)* (instruct on aiding and abetting and conspiracy). Indeed, even if the conspiracy count had survived the Rule 29 motion, the aiding and abetting theory would still have been properly included in the final jury charge. *State v. Diaz, 654 A.2d 1195 (R.I. 1995)*.

HN6[] It is permissible, indeed commonplace, to include an aiding and abetting instruction even though the defendant was charged **[*10]** as a principal. *State v. McMaugh, 512 A.2d 824, 831 (R.I. 1986)*; *Graham, supra*; see *United States v. Marino, 277 F.3d 11, 29 (1st Cir 2002)* (aiding and abetting liability is always inherent in a substantive offense); *United States v. McKnight, 799 F.2d 443, 445 (8th Cir. 1986)* ("Aiding and abetting is 'an alternative charge in every . . . count, whether explicit or implicit,'" quoting *United States v. Walker, 621 F.2d 163, 166 (5th Cir.1980))*. See *State v. Davis, 877 A.2d 642, 648 (R.I. 2005)* ("Because defendant's

[1] Chum offers no suggestion as to the nature or content of the cautionary instruction which he claims his trial attorney failed to request. Presumably, any such caveat would be akin to the one this Court gave four times during the trial and which was met with approbation by the Supreme Court. *Chum, 54 A.3d at 461*.

manner of participation is not an element of the crimes charged in the indictment, the state need not persuade a unanimous jury beyond a reasonable doubt that defendant was a principal or an aider or abettor."); *State v. Delestre, 35 A.3d 886, 895-96 (R.I. 2012)* (jury need not be unanimous as to whether defendant was an aider and abettor, a principal, or a co-conspirator, so long as unanimous in guilt).

Chum also complains that there was insufficient evidence to sustain his conviction as an aider and abettor. (Brief at p. 17.) That argument—and, indeed, the entirety of his aiding and abetting complaint—should have been raised on direct appeal. Failure to have done so forecloses any such contention in this proceeding, as it runs afoul of the post-conviction statute itself as well as the doctrine of res judicata. As set forth in *Jaiman v. State, 55 A.3d 224, 232 (R.I. 2012)*:

> "*Section 10-9.1-8*, entitled '[w]aiver of or failure to assert claims,' provides in pertinent part:
>
> > ***HN7***[⬆] Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently **[*11]** waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds that in the interest of justice the applicant should be permitted to assert such a ground for relief.
>
> "This Court has held that ***HN8***[⬆] *§ 10-9.1-8* 'codifies the doctrine of res judicata as applied to petitions for post-conviction relief.' *State v. DeCiantis, 813 A.2d 986, 993 (R.I. 2003)*. Res judicata bars the relitigation of any issue that could have been litigated in a prior proceeding, including a direct appeal, that resulted in a final judgment between the same parties or those in privity with them."

Even if Chum could somehow engraft a sufficiency of evidence claim to his application, it would fail. The credible evidence unquestionably demonstrated that Chum and Tep approached the house together. When ordered by Chum to shoot the people on the porch, Tep instantly pulled a gun and fired at them. To suggest that Chum's express directive did not fall within the scope of aiding and abetting is meritless. *Section 11-1-3, R.I.G.L.* provides: ***HN9***[⬆] "Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be **[*12]** proceeded against as a principal or as an accessory before the fact . . . " (Emphasis added.) See *Rosemond v. United States, U.S. , 134 S. Ct. 1240, 1245, 188 L. Ed. 2d 248 (2014)* ("accomplice is liable as a principal when he gives 'assistance or encouragement . . . with the intent thereby to promote or facilitate commission of the crime.'" (Citation omitted; emphasis added.)[2]

III.

IV. Rule 35 Motion

Chum also complains that his trial attorney did not file a motion to reduce his sentence under Rule 35, Super. R. Crim. P. He concedes, however, that such an omission does not by itself constitute ineffective assistance of counsel. *Burke v. State, 925 A.2d 890, 893 (R.I. 2007)*. See *Silano v. United States, 621 F. Supp. 1103, 1105 (E.D.N.Y. 1985)*.

In any event, Chum's previous attorney was appointed as his *trial* counsel, not for any post-conviction or post-sentencing matters. See *State v. Chase, 9 A.3d 1248, 1253-54 (R.I. 2010)* (a Rule 35 motion is not a "stage of the proceeding" to which the procedural right to counsel under Rule 44, Super. R. Crim. P. attaches).

Even if a Rule 35 motion had been filed, this Court would not have **[*13]** ceded a sentence reduction to Chum. His sentence was the same term imposed upon co-defendant Tep after his separate trial, who fired the shot Chum had ordered. No reason existed to impose disparate penalties for their concerted criminal misconduct.

* * *

In all, Yara Chum has failed to present any evidence that sufficiently overcomes his "prodigious burden" of demonstrating that even if his attorney's efforts were

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[2] Defendant's suggestion (Brief at p. 14.) that aiding and abetting can be done "after the fact" is simply wrong. The statute admits of no such liability for accessories *after* the fact. See LaFave Substantive Criminal Law, § 13.6(a) at 404 (2d ed. 2003) (accessory after the fact has "no part in causing the crime"); *State v. Rundle, 176 Wis. 2d 985, 500 N.W.2d 916, 925 (Wis. 1993)* (accessory after the fact is not deemed a participant in the felony).

deficient, the result would have been different. *Evans v. Wall, 910 A.2d 801, 804 (R.I. 2006)*. Accordingly, his application for post-conviction relief is denied. Judgment shall enter for the state.

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APPENDIX E

State v. Chum

Supreme Court of Rhode Island

October 25, 2012, Filed

No. 2011-254-C.A.

Reporter
54 A.3d 455 *; 2012 R.I. LEXIS 131 **; 2012 WL 5269399

State v. Yara Chum

Subsequent History: Related proceeding at State v. Tep, 56 A.3d 942, 2012 R.I. LEXIS 136 (R.I., Nov. 13, 2012)

Post-conviction relief denied at Chum v. State, 2014 R.I. Super. LEXIS 163 (Dec. 1, 2014)

Writ of habeas corpus denied, Dismissed by Chum v. Wall, 2018 U.S. Dist. LEXIS 169119 (D.R.I., Oct. 1, 2018)

Prior History: **[**1]** Providence County Superior Court. (P2/09-3192BG). Associate Justice Robert D. Krause.

Core Terms

cross-examination, trial justice, defense counsel, arrest, witnesses, shooting, suppress, rights, direct examination, opening statement, males, statement to police, circumstances, passenger, argues, red

Case Summary

Procedural Posture
Defendant was convicted in the Providence County Superior Court (Rhode Island) of two felony counts of assault with a dangerous weapon and one count of discharging a firearm while committing a crime of violence. He appealed his convictions.

Overview

Defendant said his confession was the fruit of an unlawful arrest. The supreme court held the argument was not preserved because (1) the confession was not introduced, (2) the jury was instructed that the prosecutor's reference to it in opening statement was not evidence, and (3) whether his arrest was based on probable cause, under U.S. Const. amend. IV and R.I. Const. art. I, § 6 was not preserved, as he said the confession was obtained contrary to R.I. Const. art. I, §§ 10 and 13 and U.S. Const. amends. V and VI. His arrest was lawful because the arresting officer had probable cause through corroboration of a dispatch and suspicious acts of the occupants of the car he was in. His claim that his cross-examination of officers about his statement was wrongly limited failed because (1) it was unpreserved, (2) the statement was inadmissible under R.I. R. Evid. 801(d)(2)(A), as it was not offered against him, so it was beyond the scope of direct. Claims under Rhode Island's Humane Practice Rule and that defendant could have shown inconsistencies between the statement and trial evidence failed because he was not entitled to have his version of events introduced through other witnesses.

Outcome
Defendant's convictions were affirmed.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

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Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions to Suppress

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

HN1 **Search & Seizure, Probable Cause**

When reviewing the grant or denial of a motion to suppress, the reviewing court accords deference to the trial justice's factual findings and will disturb those findings only if they clearly are erroneous. At the same time, however, the court reviews a trial justice's determination of the existence or nonexistence of probable cause or reasonable suspicion on a de novo basis.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Witnesses

Evidence > ... > Examination > Cross-Examinations > Scope

HN2 **Abuse of Discretion, Witnesses**

A challenge to a trial justice's limitation on cross-examination is reviewed under an abuse of discretion standard, and the exercise of that discretion will not be disturbed absent a clear abuse of discretion. To constitute a clear abuse of discretion, the trial justice's ruling excluding the evidence must amount to "prejudicial error."

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN3 **Procedural Matters, Rulings on Evidence**

Courts are to decide a case only on the evidence in that particular case. A matter which was not introduced or presented as evidence at trial does not come within the commonly accepted definition of "evidence." In this regard, neither testimony nor physical objects are evidence unless they are produced, introduced, and received in a trial.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Rule Application & Interpretation

HN4 **Exclusionary Rule, Rule Application & Interpretation**

If alleged improperly obtained evidence has not been admitted at trial, there is nothing that the exclusionary rule can accomplish. In such a case, the deterrent function served by the exclusionary rule has no place.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Ability to Follow Instructions

Criminal Law & Procedure > Trials > Jury Instructions > Cautionary Instructions

HN5 **Jury Deliberations, Ability to Follow Instructions**

It is well settled that it is presumed that a jury follows a trial justice's adequate cautionary instruction.

Criminal Law & Procedure > Trials > Jury Instructions > Curative Instructions

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

Criminal Law & Procedure > Trials > Motions for Mistrial

Criminal Law & Procedure > Trials > Opening

Statements

HN6[] **Jury Instructions, Curative Instructions**

When a prosecutor makes an unfulfilled promise in opening statement about the evidence that will be put before the jury, a criminal defendant has several avenues available to address the issue. Defense counsel can remind the jury during closing argument that the prosecutor promised that certain evidence would be admitted and that the evidence never materialized. Additionally, when it becomes clear that the prosecutor has suggested evidence in the opening statement that was never adduced at trial, defense counsel can seek a mistrial or, in the alternative, a curative instruction.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Probable Cause

HN7[] **Arrests, Probable Cause**

The test for probable cause supporting an arrest calls for an objective assessment in which the examining court determines, under the totality of the circumstances, whether the facts and circumstances within officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man or woman of reasonable caution in the belief that an offense has been or is being committed.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Evidence > ... > Examination > Cross-Examinations > Scope

HN8[] **Criminal Process, Right to Confrontation**

A criminal defendant has a well-established, constitutionally-protected right to effective cross-examination of the prosecution's witnesses. This bedrock constitutional safeguard is embodied in the confrontation clauses of both *U.S. Const. amend. VI* and *R.I. Const. art. I, § 10*. Although the right to confront one's adverse witnesses may be vital, cross-examination is not unbounded. Trial justices are accorded wide discretion to curtail cross-examination after there has been sufficient cross-examination to satisfy the Sixth Amendment.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

Evidence > ... > Examination > Cross-Examinations > Scope

HN9[] **Preservation for Review, Requirements**

When a trial justice sustains an objection to a line of inquiry on cross-examination and opposing counsel fails to make an offer of proof, fails to request any voir dire of the witness, and fails to articulate any reason why the court should reconsider its ruling, then that party cannot, on appeal, question the trial justice's ruling in sustaining the objection as reversible error.

Evidence > ... > Exemptions > Statements by Party Opponents > Extrajudicial Statements

HN10[] **Statements by Party Opponents, Extrajudicial Statements**

R.I. R. Evid. 801(d)(2)(A) provides that a statement is not hearsay if the statement is offered against a party and is the party's own statement, in either the party's individual or a representative capacity.

Evidence > ... > Examination > Cross-Examinations > Scope

HN11[] **Examination, Cross-Examinations**

See R.I. R. Evid. 611(b).

Criminal Law & Procedure > Trials > Witnesses > Presentation

Evidence > ... > Examination > Cross-Examinations > Scope

HN12[] **Witnesses, Presentation**

A defendant in a criminal case is not entitled to have his or her version of events introduced through the testimony of other witnesses.

Criminal Law & Procedure > Trials > Witnesses > Presentation

Evidence > ... > Examination > Cross-Examinations > Scope

HN13[] **Witnesses, Presentation**

When a criminal defendant does not take the stand at trial, he or she may not testify by other means, including by way of unsworn statements made to police. By choosing to exercise his or her Fifth Amendment right, defendant waives all rights to testify. The defendant seeks to offer testimony through his or her statements, which may raise reasonable doubt in the minds of a jury, yet deprives the State of the opportunity of cross-examination. The rules of evidence will not be manipulated in this way.

Counsel: For State: Lauren S. Zurier, Department of Attorney General.

For Defendant: Katherine C. Essington, Esq.

Judges: Present: Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia, JJ.

Opinion by: Maureen McKenna Goldberg

Opinion

[*456] Justice Goldberg, for the Court. This case came before the Supreme Court on September 25, 2012, pursuant to **[*457]** an order directing the parties to appear and show cause why the issues raised in this appeal should not summarily be decided. The defendant, Yara Chum (Chum or defendant), appeals from a conviction of two felony counts of assault with a dangerous weapon and one count of discharging a firearm while committing a crime of violence. The defendant was sentenced to concurrent terms of ten years imprisonment for each of the felony assault counts and a consecutive ten-year sentence on the firearm conviction, with five years to serve, five years suspended, with probation. On appeal, the defendant attacks his conviction on two fronts. First, relying on *Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)*, he contends that his statement to police should have been suppressed as the tainted fruit of his unlawful arrest. **[**2]** Second, the defendant argues that the trial justice deprived him of his right of confrontation by prohibiting defense counsel from cross-examining two police witnesses concerning his statements to police. After reviewing the memoranda submitted by the parties and the arguments of counsel, we are satisfied that cause has not been shown, and the appeal may be decided at this time. We affirm the judgment of conviction.

Facts and Travel

This case has its genesis in a drug deal gone awry. In the early morning of March 1, 2009, Frances Meseck, Jr. (Meseck)[1] agreed to sell to his soon-to-be ex-friend Matthew DePetrillo (DePetrillo) a quantity of marijuana. Meseck drove to the Chestnut Avenue area in Cranston, Rhode Island, to meet DePetrillo. Unexpectedly, however, DePetrillo was accompanied by another man, who was unknown to Meseck. Both men entered Meseck's car and, while DePetrillo and his friend examined the marijuana, Meseck drove around the block. When the would-be buyers indicated their willingness to make the purchase, Meseck pulled into a nearby driveway to consummate the deal. Before any money changed hands, however, DePetrillo's friend grabbed the marijuana, exited the car, and bolted **[**3]** down the street. DePetrillo informed a stunned Meseck that he had just been robbed. Meseck responded by driving after DePetrillo's companion, while DePetrillo jumped out of the moving vehicle.

Shortly after losing his merchandise, Meseck decided to even the score and enlisted the help of his friend, James Monteiro (Monteiro). The two men drove to 83 Chestnut Avenue in Cranston, where Erin Murray (Murray), a friend or associate of DePetrillo, resided. At that point, Meseck telephoned DePetrillo and told him that, if the marijuana was not returned or paid for within ten minutes, Meseck and Monteiro would smash the

[1] Meseck himself spelled his first name as "F-r-a-n-c-e-s."

windows of Murray's house on 83 Chestnut Avenue. When DePetrillo refused to comply with Meseck's demands, Meseck and Monteiro made good on their threats—a tire iron and a brick crashed through the windows at 83 Chestnut Avenue.

At the time of these events, Meseck was living in a multifamily duplex at 33 Peach Avenue in Providence with Monteiro, James McArdle (McArdle), Lorenzo Saraceno (Saraceno), and others. The dispute between Meseck and DePetrillo moved to Providence. When Meseck was visiting his parents' house in Scituate, **[**4]** Rhode Island, he received a call from DePetrillo, informing him that he was on his way to 33 Peach Avenue and looking for a fight. DePetrillo warned Meseck that he was "going to kick in [his] door with a .44 and shoot [him]." Meseck hastily returned to Providence **[*458]** and called Monteiro to warn the residents of 33 Peach Avenue of the impending threat.

Armed with this news, McArdle, Monteiro, and Saraceno positioned themselves on the front porch of 33 Peach Avenue, as two vehicles, a white Acura and a maroon-colored Acura, slowly passed the residence. McArdle recognized DePetrillo as the man in the white Acura who was pointing at the house. Within minutes, McArdle, Monteiro, and Saraceno watched as two Asian males approached the house. The record discloses that the taller of the two males later was identified by these witnesses as defendant. The other man was identified as Samnang Tep (Tep), who was named as a codefendant.

As the men drew near, defendant asked, "Which one of you broke my home girl's window?" When Monteiro replied that the absent Meseck was responsible, the men turned to leave. More words were exchanged between the two groups, however, and defendant eventually told Tep to **[**5]** shoot the men on the porch. Tep pulled out a gun and fired a single shot in the direction of the porch, hitting the porch railing.[2] After Tep fired, he and defendant ran away; McArdle called 911.

Cranston Police Department Patrolman Anthony Bucci (Ptlm. Bucci) was notified by dispatch that a shooting had occurred in Providence and that two suspect vehicles—a white Acura and a red Acura—driven by Asian males had fled the scene. Patrolman Bucci was further informed that the vehicles might be traveling to the area of Magnolia Street and 83 Chestnut Avenue. After exchanging his marked police cruiser for an unmarked car, Ptlm. Bucci proceeded to the Chestnut Avenue area. Within minutes of his arrival, Ptlm. Bucci spotted a red Acura, driven by an Asian male, proceeding in the opposite direction. As Ptlm. Bucci turned his vehicle around, the Acura quickly turned off Chestnut Avenue without a turn signal being used; and the car temporarily disappeared from Ptlm. Bucci's view.

When **[**6]** Ptlm. Bucci next observed the Acura, it was parked at the side of Oakland Avenue, in the vicinity of Chestnut Avenue. As the passenger exited the vehicle, the driver moved into the passenger seat. Patrolman Bucci pulled behind the Acura, exited his vehicle, and approached the passenger, who was standing at the side of the road. Patrolman Bucci recognized this man as defendant. The defendant and Tep, the driver of the vehicle, were placed in custody.

Later that evening, Providence Police Detective Michael Otrando (Det. Otrando) interviewed defendant. The defendant was seated at a conference table without handcuffs or other restraints. Detective Ronald Riley, Jr. (Det. Riley) and Ptlm. Bucci also were present. After Det. Riley advised defendant of his Miranda rights, defendant acknowledged that he understood his rights and indicated so on the rights form. Detective Otrando informed defendant that he had been positively identified as having been involved in the shooting. The defendant agreed to make an oral statement and admitted his participation in the shooting.

A five-count criminal information subsequently was filed against defendant, Tep, and Murray.[3] The defendant filed a pretrial **[*459]** **[**7]** motion to suppress, contending that the statements "were procured in

[2] Although the record discloses that McArdle was on the porch when defendant and Tep first approached 33 Peach Avenue, at the time of the shooting McArdle had retreated into his house and was standing at the bay window.

[3] The information charged defendant with two counts of felony assault with a dangerous weapon, one count of conspiracy to commit assault with a dangerous weapon, one count of carrying a firearm while committing a crime of violence, and one count of discharging a firearm while committing a crime of violence. After the close of the state's case at trial, the trial justice sua sponte entered a judgment of acquittal on the conspiracy count under Rule 29(a)(1) of the Superior Court Rules of Criminal Procedure. The state dismissed the count charging defendant with carrying a firearm while committing a crime of violence under Rule 48(a) of the Superior Court Rules of Criminal Procedure. **[**8]** The charges against Murray were dismissed on June 23, 2010.

violation of rights secured to the defendant by *Article I, Sections 10* and *13 of the Rhode Island Constitution* and by the *Fifth* and *Sixth Amendments to the United States Constitution*, and in violation of the protections of *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*." The trial justice, after an evidentiary hearing, denied the motion, finding by clear and convincing evidence that the statements were freely and voluntarily given and that defendant had been fully apprised of his Miranda rights.

Before opening statements, the trial justice gave the jury the following admonishment: "I tell you now, and I probably will remind you before this case is over, the statements of lawyers are not evidence. The only evidence you consider is that which comes in from the witness stand or any exhibits that may be marked as full exhibits." During his opening statement, the prosecutor referred to defendant's incriminating statement. Specifically, he told the jury:

> "I told you we'd prove this case with witnesses; we'd also prove it with the defendant's words himself, because, when the detectives came to the Cranston Police Department, they read him his rights and sat down and talked to him. And the defendant told them that he was contacted by Erin [Murray] and told that she needed him to take care of something; that she wanted them to take care of some kid named Frankie for smashing her windows; that he drove down to Peach Avenue with Matthew DePetrillo and Erin [Murray] so that they could point out the house; that he approached the house with a friend, Vang Chhit; that he approached some guys on the porch; that he ordered Chhit to **[**9]** shoot the guys; that Erin [Murray], Matthew DePetrillo and Samnang Tep were in a different car waiting around the corner; and that he and Chhit fled in separate cars, one red, and one white. You'll hear that. You'll hear about the defendant giving that statement to the Providence Police."[4]

Notwithstanding the prosecutor's promise to the jury, defendant's statement was not offered into evidence, and defendant failed to object to this circumstance by motion to pass the case or otherwise.

At trial, the state called Ptlm. Bucci in its case-in-chief. During direct examination, Ptlm. Bucci testified about the circumstances of defendant's arrest. On cross-examination, defense counsel asked Ptlm. Bucci if he knew when defendant had been advised of his Miranda warnings. The state objected, and the trial justice sustained the objection. Defense counsel then proceeded with cross-examination without protest.

The state also called Det. Otrando to discuss the photo arrays from which McArdle, Monteiro, and Saraceno identified defendant and **[**10]** Tep. On cross-examination, defense counsel asked Det. Otrando whether he had responded to the scene of **[*460]** the shooting. The state's objection to this question was sustained. Defense counsel then asked Det. Otrando, "When you arrived at 33 Peach [Avenue], you interviewed three individuals, correct?" The trial justice again sustained the state's objection. The following sidebar conversation then ensued:

> "THE COURT: Where are you going? This witness was offered for very close and discrete reasons; identification of photographs only. If you're thinking that you're going to inquire of him as to what your client said to him, I'm not going to permit it. Or, for that matter, any other witness that was interviewed by him. That's all hearsay. Not admissible through this witness. If you want your client's statement in front of this jury, the only way it's going to get there is if he gets on that stand.
>
> "[Defense counsel]: Okay. That's fine, Your Honor."

At that point, defense counsel had no further questions for Det. Otrando.

Before closing arguments, the trial justice reminded the jury once again that the statements and arguments of the lawyers were not evidence. The jury convicted defendant of two **[**11]** counts of felony assault with a dangerous weapon and one count of discharging a firearm while committing a crime of violence. On April 21, 2010, the trial justice denied defendant's motion for a new trial. He sentenced defendant to ten years imprisonment on each of the felony assault counts, to be served concurrently, and a consecutive ten-year sentence on the remaining firearms count, with five years to serve and five years suspended, with probation. The defendant appeals.

Standard of Review

HN1[↑] When reviewing the grant or denial of a motion to suppress, we accord deference to the trial justice's factual findings and will disturb those findings only if they clearly are erroneous. *State v. Taveras, 39 A.3d*

[4] Although the prosecutor stated that defendant's statement implicated Chhit as the shooter, the state's evidence at defendant's trial identified Tep as the shooter.

638, 645-46 (R.I. 2012); State v. Flores, 996 A.2d 156, 160 (R.I. 2010). At the same time, however, this Court reviews "a trial justice's determination of the existence or nonexistence of probable cause or reasonable suspicion on a de novo basis." Taveras, 39 A.3d at 646 (quoting State v. Abdullah, 730 A.2d 1074, 1076 (R.I. 1999)); see Flores, 996 A.2d at 160.

HN2[] We review a challenge to a trial justice's limitation on cross-examination under an abuse of discretion standard, and we will not **[**12]** disturb the exercise of that discretion absent a clear abuse of discretion. State v. Peoples, 996 A.2d 660, 664 (R.I. 2010); State v. McManus, 990 A.2d 1229, 1234 (R.I. 2010). To constitute a clear abuse of discretion, the trial justice's ruling excluding the evidence must amount to "prejudicial error." State v. Stansell, 909 A.2d 505, 510 (R.I. 2006) (quoting State v. Oliveira, 730 A.2d 20, 24 (R.I. 1999)).

Analysis

On appeal, defendant offers two reasons why his conviction should be overturned. First, defendant contends that the trial justice erred in denying his motion to suppress his statement because it was obtained as a result of an unlawful arrest. Second, defendant asserts that the trial justice violated his right of confrontation and right to a fair trial by restricting his counsel's cross-examination of Ptlm. Bucci and Det. Otrando. We reject these contentions.

I

Motion to Suppress

For the first time in these proceedings, defendant raises a Fourth Amendment challenge to the admissibility of his confession. He argues that there was no **[*461]** probable cause to support his arrest by Ptlm. Bucci and that the Miranda warnings did not attenuate the taint of this purported illegal arrest, thereby **[**13]** making his statement the fruit of Wong Sun's storied poisonous tree. See Wong Sun, 371 U.S. at 487-88. In addition to the fact that this argument is not properly before us, the statement was not introduced into evidence.

At no point during defendant's trial did the state introduce into evidence the statement he gave to the Providence police. Thus, the issue concerning the trial justice's denial of the motion to suppress—either on Fourth or Fifth Amendment grounds—is not a proper subject on appeal. See State v. Huy, 960 A.2d 550, 554 (R.I. 2008) ("For us to address Huy's contention that the contraband and confession were obtained illegally, the evidence must have been introduced at trial."); 29 Am. Jur. 2d Evidence § 3 at 37 (2008) (HN3[] "Courts are to decide a case only on the evidence in that particular case. A matter which was not introduced or presented as evidence at trial does not come within the commonly accepted definition of 'evidence.' In this regard, neither testimony nor physical objects are evidence unless they are produced, introduced, and received in a trial.").

Our conclusion squarely comports with the prophylactic purposes that underlie the exclusionary rule. See Huy, 960 A.2d at 556. **[**14]** As we explained in Huy, HN4[] "if the alleged improperly obtained evidence has not been admitted at trial, there is nothing that the exclusionary rule can accomplish. In such a case, the deterrent function served by the exclusionary rule has no place." Id. So it is here.

To be sure, the prosecutor referred to defendant's statement in his opening statement to the jury. Although defendant desperately clings to this fact, it affords him no harbor because statements of counsel are not evidence. See State v. Tevay, 707 A.2d 700, 702 (R.I. 1998). The record discloses that the trial justice instructed the jury before the opening statements and again at closing arguments that statements of counsel were not evidence. HN5[] It is well settled that this Court presumes that the jury follows a trial justice's adequate cautionary instruction. See State v. Dubois, 36 A.3d 191, 197 (R.I. 2012); State v. Lynch, 19 A.3d 51, 61 (R.I. 2011). The trial justice's instructions in this case plainly were adequate.

Furthermore, HN6[] when, as in this case, a prosecutor makes an unfulfilled promise in opening statement about the evidence that will be put before the jury, a criminal defendant has several avenues available to address **[**15]** the issue. Defense counsel can remind the jury during closing argument that the prosecutor promised that certain evidence would be admitted and that the evidence never materialized. See State v. Perry, 779 A.2d 622, 626-27 (R.I. 2001) (holding that the trial justice erred in prohibiting defense counsel from arguing to the jury that the prosecutor promised in opening statement that a certain witness would be called to testify and that witness did not appear). Additionally, when it becomes clear that the

prosecutor has suggested evidence in the opening statement that was never adduced at trial, defense counsel can seek a mistrial or, in the alternative, a curative instruction. *Id. at 628*. In this case, defense counsel failed to use any of these mechanisms.

Moreover, defendant's contention that the trial justice erred in denying his motion to suppress suffers from yet another fatal flaw. In his motion to suppress, defendant asserted that his statements "were procured in violation of rights secured to the defendant by *Article I, Sections 10* and *13 of the Rhode Island Constitution* and by **[*462]** the *Fifth* and *Sixth Amendments to the United States Constitution*, and in violation of the protections **[**16]** of *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*." The defendant failed to cite either the *Fourth Amendment to the United States Constitution* or *article 1, section 6 of the Rhode Island Constitution.* Whether his arrest was lawful and based on probable cause, therefore, is not before us.

In *State v. Brennan, 526 A.2d 483, 487 & n.1 (R.I. 1987)*, the defendant argued for the first time on appeal that his statements should have been suppressed because of his unlawful arrest. This Court deemed the issue waived. *Id. at 487*. Similarly, in *State v. De Witt, 423 A.2d 828, 829-30 (R.I. 1980)*, the defendant contended that his confession was the tainted fruit of his unlawful arrest. Before the hearing justice, however, the defendant had argued only that his statement should be excluded because it was coerced. *Id. at 830*. We therefore refused to consider his Fourth Amendment contentions on appeal because those arguments were not raised at trial. Id.

Notwithstanding defendant's failure to preserve this issue, our careful review of the record satisfies us that his contention is without merit. ***HN7***[↑] The test for probable cause is well established. It calls for

> "an objective assessment in which the examining court **[**17]** determines, under the totality of the circumstances, whether 'the facts and circumstances within * * * [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.'" *Flores, 996 A.2d at 161* (quoting *Maryland v. Pringle, 540 U.S. 366, 372 n.2, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003))*.

Under this standard, Ptlm. Bucci had ample probable cause to arrest defendant. He received a call from dispatch shortly after the shooting that a white Acura and a red Acura driven by Asian males had left the scene of the shooting and might be headed to the area of Magnolia Street and 83 Chestnut Avenue. Within minutes of his arrival, Ptlm. Bucci saw a red Acura driven by an Asian male. As he turned his vehicle around, the Acura turned and sped away. When Ptlm. Bucci next observed the vehicle, it was stopped on the street; the passenger, another Asian male, exited the vehicle as the driver transferred to the passenger side. To an experienced police officer, this is suspicious behavior. The totality of these circumstances, including Ptlm. Bucci's corroboration of several details of the **[**18]** police dispatch, coupled with the actions of the occupants of the Acura, warranted an officer of reasonable caution in the belief that an offense had been committed and that defendant was the one who committed it. See *Flores, 996 A.2d at 161*. Therefore, we are satisfied that Ptlm. Bucci had probable cause to arrest defendant.

II

Limitation on Cross-Examination

The defendant next argues that, by prohibiting his counsel from questioning Det. Otrando and Ptlm. Bucci concerning defendant's statement, the trial justice deprived him of his right to confront witnesses and denied him a fair trial. We discern no error.

HN8[↑] A criminal defendant has a "well-established, constitutionally-protected right * * * to effective cross-examination of the prosecution's witnesses." *Dubois, 36 A.3d at 198*. This bedrock **[*463]** constitutional safeguard is embodied in the *confrontation clauses of both the Sixth Amendment to the United States Constitution* and the Declaration of Rights of the *Rhode Island Constitution, article 1, section 10*. *State v. Clark, 974 A.2d 558, 575 (R.I. 2009)*. Although the right to confront one's adverse witnesses may be vital, cross-examination is not unbounded. See *Stansell, 909 A.2d at 510*. "[T]rial **[**19]** justices are accorded wide discretion to curtail cross-examination after there has been 'sufficient cross-examination to satisfy the *Sixth Amendment*.'" Id. (quoting *Oliveira, 730 A.2d at 24*).

In this case, the trial justice precluded cross-examination of Det. Otrando concerning defendant's

statement because it was inadmissible hearsay. Although defense counsel responded, "Okay. That's fine, Your Honor[,]" defendant takes a different tack in this Court. The defendant now argues that his statement was not hearsay, even if offered through police witnesses on cross-examination, because the statement was an admission of a party-opponent under Rule 801(d)(2)(A) of the Rhode Island Rules of Evidence. We disagree.

At the outset, we note that defendant has not properly preserved for our review any challenge to the trial justice's limitations on his cross-examination. In *State v. Hazard, 785 A.2d 1111, 1115-16 (R.I. 2001)*, we explained:

> ***HN9***[] "When a trial justice sustains an objection to a line of inquiry on cross-examination and opposing counsel fails to make an offer of proof, fails to request any voir dire of the witness, and fails to articulate any reason why the court should reconsider its ruling, **[**20]** then that party cannot, on appeal, question the trial justice's ruling in sustaining the objection as reversible error."

Defense counsel in this case failed to comply with any one of these preservation mandates.

Nonetheless, the contention lacks merit. ***HN10***[] Rule 801(d)(2)(A) provides that "[a] statement is not hearsay if: * * * [t]he statement is offered against a party and is (A) the party's own statement, in either the party's individual or a representative capacity * * *." (Emphasis added.) Here, defendant's statement to police does not fall within Rule 801(d)(2)(A); while it was his own statement, it was not offered against him. See *State v. Harnois, 638 A.2d 532, 535 (R.I. 1994)* (affirming trial justice's determination that the defendant's statements to police were not admissible under Rule 801(d)(2)(B) when the defendant sought to elicit statements from several police officers).

Moreover, the trial justice properly refused to permit cross-examination concerning defendant's statement because it was beyond the scope of the state's direct examinations of Det. Otrando and Ptlm. Bucci. Rule 611(b) of the Rhode Island Rules of Evidence provides that ***HN11***[] "[c]ross-examination should be limited to **[**21]** the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." In this case, Ptlm. Bucci testified on direct examination about the circumstances of defendant's arrest. Detective Otrando was, in the trial justice's words, "offered for very close and discrete reasons; identification of photographs only." Therefore, defendant's statement to police was outside the scope of the direct examinations of both of these police witnesses.

Indeed, defendant concedes that both attempted inquiries were beyond the scope of direct examination; but he contends, **[*464]** nevertheless, that the trial justice abused his discretion under Rule 611(b). First, defendant asserts that the evidence may have led to further evidence concerning whether the statement was voluntary under Rhode Island's Humane Practice Rule. See *State v. Tassone, 749 A.2d 1112, 1117-18 & n.7 (R.I. 2000)* (outlining contours of Humane Practice Rule). Second, defendant argues that, if his statement had been admitted, he would have been able to point out the inconsistencies between that statement **[**22]** and trial evidence.[5] Both of these arguments are unavailing: the statement was not introduced into evidence, and ***HN12***[] a defendant in a criminal case is not entitled to have his version of events introduced through the testimony of other witnesses.

In Harnois, a case in which the defendant was unable to elicit his out-of-court statements through the police witnesses, we explained that:

> ***HN13***[] "The defendant did not take the stand at trial. He may not testify by other means, including by way of the unsworn statements made to police. * * * By choosing to exercise his Fifth Amendment right, defendant waived all rights to testify. * * * The defendant was seeking to offer testimony through his statements, which might raise reasonable doubt in the minds of a jury, yet would deprive the state of the opportunity of cross-examination. The rules of evidence will not be manipulated in this way." *Harnois, 638 A.2d at 535-36*.

This Court has reaffirmed Harnois on several occasions. See, e.g., *State v. Lomba, 37 A.3d 615, 622 (R.I. 2012)* ("As was his absolute right, defendant chose not **[**23]** to take the stand at trial, but after having made that decision, '[h]e may not testify by other means, including by way of the unsworn statements made to police.'" quoting *Harnois, 638 A.2d at 535-36*); *Hazard, 785 A.2d at 1119*; see also *State v. Bustamante, 756 A.2d 758, 763-64 (R.I. 2000)* (affirming the trial justice's

[5] Specifically, defendant attaches significance to the fact that his statement identified Vang Chhit, and not Tep, as the shooter.

refusal to allow the defendant to elicit his statements through the testimony of a police officer because it "would permit defendant to introduce his own statements into evidence without taking the stand, thus depriving the prosecutor of the opportunity to cross-examine the proponent of those statements, defendant himself").

Therefore, we are satisfied that the trial justice properly precluded the defendant from eliciting his statement to police during the cross-examination of Det. Otrando and Ptlm. Bucci.

Conclusion

For the reasons articulated above, we affirm the judgment of conviction. The papers may be remanded to the Superior Court.

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