SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5596-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

R.M.,

Defendant-Appellant.

Submitted December 6, 2016 – Decided April 17, 2017

Before Judges Messano and Suter.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 08-06-1047.

Joseph E. Krakora, Public Defender, attorney for appellant (Kimmo Abbasi, Designated Counsel, on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Joie Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a jury trial, defendant R.M. was found guilty of first-degree aggravated sexual assault of N.S., N.J.S.A. 2C:14-

2(a); second-degree sexual assault of N.S., N.J.S.A. 2C:14-2(b); second-degree endangering the welfare of N.S., N.J.S.A. 2C:24-4(a); second-degree sexual assault of D.S., N.J.S.A. 2C:14-2(c); and second-degree endangering the welfare of D.S., N.J.S.A. 2C:24-4(a). Defendant subsequently pled guilty before a different judge to two counts of the same indictment that were severed from trial charging him with second-degree sexual assaults of two other victims. Defendant was sentenced to an aggregate term of twenty-two years imprisonment subject to an 85% period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, and the second judge imposed concurrent sentences on defendant's guilty pleas.

The trial judge denied defendant's motion for a new trial. We affirmed defendant's convictions and sentences on direct appeal, State v. R.M., No. A-3089-10; A-3169-10 (App. Div. Jan. 25, 2013), and the Court denied his petition for certification, 214 N.J. 176 (2013).

Defendant filed a timely pro se petition for post-conviction relief alleging, among other things, ineffective assistance of counsel (IAC). In addition to filing an extensive brief, appointed PCR counsel supplied additional support for the petition — a certification from defendant's father, Laurence.

Trial counsel listed Laurence as a possible witness at trial.[1] In his certification, Laurence said that he observed three jurors frequently sleeping during trial, he and his son told counsel about it, but counsel never brought it to the judge's attention.[2] Laurence also certified that trial counsel refused to call him as a witness, even though he had relevant knowledge. Specifically, Laurence explained that H.S., who testified at trial, formerly lived with defendant and was the mother of victim N.S., as well as two of defendant's children. He claimed H.S. made statements that she would seek "revenge" because defendant "had wronged her," like other men in her life. Even if trial counsel did not call Laurence as a witness, Laurence insisted he should have at least cross-examined H.S. about these statements.

During oral argument on the petition, PCR counsel asserted trial counsel was ineffective for failing to advise the judge that jurors were sleeping and failing to call Laurence as a witness or cross-examining H.S. about her statements. He also argued defendant's motion for a new trial should have been granted, and

---

[1] Although, counsel's letter provided the wrong name for defendant's father.

[2] To avoid confusion, we use the first name of defendant's father. We intend no disrespect by this informality.

appellate counsel was ineffective for failing to raise these and other arguments on direct appeal.

On April 15, 2015, the PCR judge, who was also the trial judge, filed an extensive written opinion in which he addressed these arguments and found them all without merit. He denied the petition without an evidentiary hearing, and this appeal followed.

Before us, in Point I, defendant contends the judge should have granted an evidentiary hearing based upon Laurence's certification regarding the sleeping jurors and H.S. In Point II, defendant argues appellate counsel provided ineffective assistance, and, in Point III, defendant contends the judge erred by denying his motion for a new trial. We have considered these arguments in light of the record and applicable legal standards. We affirm.

To establish an IAC claim, a defendant must satisfy the two-prong test formulated in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). First, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Fritz, supra, 105 N.J. at 52 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693).

Second, a defendant must prove he suffered prejudice due to counsel's deficient performance. Ibid. (citing Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Id. at 58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; Fritz, supra, 105 N.J. at 52). "If [a] defendant establishes one prong of the Strickland-Fritz standard, but not the other, his claim will be unsuccessful." State v. Parker, 212 N.J. 269, 280 (2012).

We apply the same standard to defendant's claims of ineffective assistance by appellate counsel. State v. Gaither, 396 N.J. Super. 508, 513 (App. Div. 2007) (citing State v. Morrison, 215 N.J. Super. 540, 546 (App. Div.), certif. denied, 107 N.J. 642 (1987)), certif. denied, 194 N.J. 444 (2008).

Our Rules anticipate the need to hold an evidentiary hearing on IAC claims "only upon the establishment of a prima facie case in support of post-conviction relief . . . ." R. 3:22-10(b). A "prima facie case" requires a defendant "demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on

the merits," ibid., and must be supported by "specific facts and evidence supporting his allegations." State v. Porter, 216 N.J. 343, 355 (2013). "[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157-58, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997)).

As to the jurors, since neither the prosecutor nor counsel complained that some were asleep, the judge's personal observations are significant. See State v. Mohammed, 226 N.J. 71, 87-88 (2016) (noting a reviewing court should defer to the judge's personal observations that a juror was not asleep). In this case, the judge made clear that he never witnessed any juror sleeping during trial. Laurence's contrary claims do not entitle defendant to an evidentiary hearing.[3]

We described the import of H.S.'s trial testimony in our prior opinion. R.M., supra, slip op. at 5-7. In addition, a

[3] Moreover, there was a sequestration order in effect during trial. At one point, during the testimony of the State's first witness, H.S., Laurence was asked to leave the courtroom, and the judge provided an instruction to the jury regarding the sequestration order. In his certification, Laurence fails to explain exactly at what point he made observations of sleeping jurors, nor does he explain why he was in the courtroom despite the sequestration order in effect.

review of the record indicates trial counsel vigorously cross-examined her, highlighting inconsistencies in her prior statements and testimony during a Rule 104 hearing. Counsel brought out that H.S. did not report the incident to police for some time, and called and sent emails to defendant even after making the report.

More importantly, both N.S. and D.S. testified at trial about conduct that was the crux of the case against defendant. Both were extensively cross-examined. Id. at 8. We conclude, as did the judge, that defendant suffered no prejudice from counsel's decision not to call Laurence as a witness and not to cross-examine H.S. as to whether revenge motivated her notification to law enforcement.

The arguments made in Point III are the same defendant raised before the trial judge when he moved for a new trial after the verdict. Defendant is procedurally barred from raising them on PCR review because they could have been raised on direct appeal but were not. State v. Echols, 199 N.J. 344, 357 (2009) (citing R. 3:22-4(a)).

In Point II, defendant makes no specific claim why appellate counsel's performance was deficient. We assume the argument is that appellate counsel should have raised the denial of defendant's new trial motion on direct appeal. "To remedy the prejudice to [a] defendant resulting from the ineffective assistance he

received in his direct appeal, we . . . consider[] the issues presented . . . from a denial of post[-]conviction relief as if they were being presented in a direct appeal." State v. Guzman, 313 N.J. Super. 363, 375 (App. Div.) (citing Mayo v. Henderson, 13 F.3d 528, 537 (2d Cir. 1994)), certif. denied, 156 N.J. 424 (1998).

"[P]ursuant to Rule 3:20-1, the trial judge shall not set aside a jury verdict unless 'it clearly and convincingly appears that there was a manifest denial of justice under the law.'" State v. Armour, 446 N.J. Super. 295, 305-06 (App. Div. 2016). "[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." Id. at 306 (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)).

In this case, the judge considered all the arguments now made when he denied defendant's motion for a new trial, and we find no mistaken exercise of the judge's discretion in having denied the motion. In short, "[t]he failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel." State v. Worlock, 117 N.J. 596, 625 (1990); accord Echols, supra, 199 N.J. at 361.

Affirmed.