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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5818-13T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASOOL MCCRIMMON, a/k/a RASOOL W.
MCCRIMMON, a/k/a DAHEEM MCWRITTE,
a/k/a DAHEEM MCWRITE, a/k/a
ANTHONY M. WOODS, a/k/a OOKIE,

Defendant-Appellant.

Submitted November 1, 2016 – Decided February 16, 2017

Before Judges Fisher and Vernoia.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Indictment
No. 05-01-0054.

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

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Lucille
M. Rosano, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Rasool McCrimmon appeals an April 14, 2014 order denying his post-conviction relief (PCR) petition after an evidentiary hearing. We affirm.

I.

Defendant was convicted after a jury trial of first-degree knowing and purposeful murder, N.J.S.A. 2C:11-3(a)(1) and (2), third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b), and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a). The judge imposed an aggregate custodial sentence of fifty years subject to the requirements of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

We summarized the facts giving rise to defendant's conviction in our opinion on his direct appeal, State v. McCrimmon, No. A-0477-07 (App. Div. August 18, 2011) (slip op. at 1-5), certif. denied, 209 N.J. 232 (2012). We restate the facts relevant to this appeal.

On the morning of July 17, 2004, Darius Davis, known as Kojak, had his hair cut by Bowman "Bomber" Caldwell at Bombers Unisex Salon on South 8th Street in Newark. Willard Lester was in the shop at the same time, as were several other people, including Idrissa Wilson and two young girls about eight or nine years old. After Bomber Caldwell cut Kojak's hair, Kojak went into the bathroom. A man described as a light-skinned black man, identified by Caldwell and Lester as defendant, entered the

shop looking for Kojak. Informed that he was in the bathroom, defendant went to find Kojak. Caldwell and Idrissa Wilson heard defendant tell Kojak they had something to talk about and the two men left the shop, although Wilson was unable to identify defendant as the man that left the shop with Kojak.

Within minutes, Lester, who was sitting near the door and front window, exclaimed that Kojak had been or was in the course of being shot. Lester described Kojak walking up the street trying to return to Bomber's shop. As he reached the top step, Kojak collapsed. Bomber Caldwell did not witness the shooting or Kojak's progress up the street. When he heard Lester exclaim that Kojak had been shot, he hurried to put the young girls in a back room away from harm. Then, he tried to call for an ambulance. He encountered the victim as he reached the top step and porch of his shop.

Kojak was pronounced dead at the hospital. The medical examiner, Dr. Wayne Wilson, testified that the victim died of four perforating gunshot wounds: one in and out of his right shoulder; two in and out of his right chest; and one in the lower left side of his back. All entered through the back and exited through the front of the body. . . . The medical examiner opined that the victim may have been slightly bent over when the bullet in the left lower back entered his body. He was not shot at close range. The muzzle of the gun was no less than eighteen inches to two feet from the victim when the shots were fired. The medical examiner could not determine the farthest distance between the muzzle of the gun and the victim when the shots were fired.

Detectives at the crime scene were able to determine that six shots were fired. Two shots were fired into the victim's truck from

the passenger side of defendant's vehicle. None of those shots struck the victim. The other four shots struck the victim in the back as he left the area of his truck and tried to flee in the direction of Bomber Caldwell's shop. Ballistic examination of the bullets confirmed that all of the shots were fired from a single gun.

The crime scene observations of the detectives confirmed Lester's July 14 and August 6 statements and his grand jury testimony, except that Lester stated at one time that defendant fired at Kojak from the driver's side of the truck. In his statements and in his grand jury testimony, Lester also stated that Kojak and defendant left the shop together and that he saw defendant fire at least six shots. He also testified that he observed defendant walk calmly across the street, enter a black sport car, and slowly drive away from the scene. He also provided detectives with a partial license plate number. Neither the car nor the gun were ever located.

At trial, Lester was less forthcoming. He testified that Kojak was in Bomber's shop and that he saw defendant enter the shop. He testified that he did not hear defendant state that Kojak and he needed to talk. He related that both left the shop but not together. Lester testified that he did not see the two men meet until they were further down the street and close to the victim's truck. He did identify defendant, however, as the shooter. As a result of the inconsistencies in Lester's testimony, after a Gross hearing, the trial judge permitted several portions of Lester's July and August statements to be introduced in evidence.

[Id. at 2-5.]

Following the disposition of defendant's direct appeal, defendant filed a PCR petition and was assigned counsel. In support of the petition defendant argued:

POINT I

AN EVIDENTIARY HEARING SHOULD BE GRANTED TO PETITIONER TO PRESENT HIS PCR CLAIMS.

POINT II

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED HIM BY THE UNITED STATES AND NEW JERSEY CONSTITUTIONS.

A. FAILURE TO NOTIFY PETITIONER THAT HE FACED A MINIMUM SENTENCE OF THIRTY (30) YEARS WITHOUT PAROLE IF CONVICTED AT TRIAL.

B. FAILURE TO CALL A CERTAIN WITNESS.

C. FAILURE OF DEFENSE COUNSEL TO OBJECT TO THE IN COURT AND OUT OF COURT IDENTIFICATION BY MR. LESTER BY THE POLICE.

D. FAILURE TO MEMORIALIZE THE PRE-TRIAL INTERVIEW OF MR. CALDWELL.

E. FAILURE TO REQUEST THE VOIR DIRE OF JUROR, MR. ELPHICK.

F. FAILURE OF DEFENSE COUNSEL TO OBJECT TO ALL IMPROPER AND PREJUDICIAL REMARKS MADE BY THE PROSECUTOR DURING HIS SUMMATION.

G. FAILURE TO ADEQUATELY EXPLAIN TO PETITIONER THE RAMIFICATIONS OF NOT TESTIFYING ON [HIS] OWN BEHALF.

H. PREJUDICE.

POINT III

THE AGGREGATE ERRORS DENIED DEFENDANT A FAIR TRIAL. . . .

The PCR court conducted an evidentiary hearing during which defendant's trial counsel was the sole witness. The court denied the PCR petition, determined trial counsel was a credible witness, made findings of fact, and determined defendant failed to prove counsel was ineffective. The court also concluded defendant failed to establish that there was a reasonable probability that but for trial counsel's purported errors, the result of the trial would have been different. The court entered an order denying defendant's PCR petition. This appeal followed.

On appeal, defendant makes the following arguments:

THE TRIAL COURT ERRED IN DENYING MCCRIMMON'S PETITION FOR POST-CONVICTION RELIEF DESPITE THE FACT THAT MCCRIMMON DEMONSTRATES A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A. Trial Counsel Was Ineffective When He Failed to Notify McCrimmon That He Faced A Minimum Sentence of Thirty Years Without Parole If Convicted At Trial.

B. Trial Counsel Was Ineffective When He Failed To Call Important Witnesses At Trial Who Would Have Benefitted The Defense.

C. Trial Counsel Was Ineffective When He Failed To Object To Lester's In-Court and Out-of-Court Identification of McCrimmon To The Police.

D. Trial Counsel Was Ineffective When He Failed To Memorialize His Pre-Trial Interview of Caldwell.

E. Trial Counsel Was Ineffective When He Failed To Object to All Improper and Prejudicial Remarks Made By The Prosecutor During His Summation.

F. Trial Counsel Was Ineffective When He Failed to Adequately Explain to McCrimmon The Ramifications of Not Testifying At Trial.

Defendant further argues the following points in his pro se supplemental brief:

POINT ONE

TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO NOTIFY MCCRIMMON THAT HE FACED A MINIMUM OF THIRTY YEARS WITHOUT PAROLE IF CONVICTED AT TRIAL.

POINT TWO

THE COURT SHOULD REMAND THIS CASE FOR A COMPLETE EVIDENTIARY HEARING BECAUSE DEFENDANT DID NOT TESTIFY AT THE FIRST HEARING WHICH DEPRIVED THE JUDGE THE OPPORTUNITY TO WEIGH DEFENDANT'S CREDIBILITY (Not raised below)[.]

II.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee a defendant in a criminal proceeding the right to the assistance of counsel. State v. Nash, 212 N.J. 518, 541 (2013). This right includes "the right to the effective assistance of counsel." Ibid.

(quoting Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984)).

The Court established a two-part test in Strickland, later adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), to determine whether a defendant has been deprived of the effective assistance of counsel. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Under the first prong of this test, a petitioner must show that counsel's performance was deficient by demonstrating that counsel's handling of the matter "fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

"The first prong of the test is satisfied by a showing that counsel's acts or omissions fell outside the wide range of professionally competent assistance considered in light of all the circumstances of the case." State v. Allegro, 193 N.J. 352, 366 (2008) (quoting State v. Castagna, 187 N.J. 293, 314 (2006)). "[T]here is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Castagna, supra, 187 N.J. at 314 (quoting Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694).

Under the second prong, a defendant "must show that the deficient performance prejudiced the defense." Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. That is, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "The error committed must be so serious as to undermine the court's confidence in the jury's verdict or the result reached." Castagna, supra, 187 N.J. at 315.

"Thus, in order to sustain a claim of ineffective assistance of counsel, two separate elements must coalesce: a defendant must prove an objectively deficient performance by defense counsel, and that such deficient performance so inured to the defendant's prejudice that it is reasonably probable that the result would be altered." Allegro, supra, 193 N.J. at 366. "With respect to both prongs of the Strickland test, a defendant asserting ineffective assistance of counsel on PCR bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 350 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013). A failure to satisfy either prong of the Strickland standard requires the denial of a petition for PCR. Strickland, supra, 466 U.S. at 700,

104 S. Ct. at 2071, 80 L. Ed. 2d at 702; Nash, supra, 212 N.J. at 542; Fritz, supra, 105 N.J. at 52.

Our review of a PCR's court's decision after an evidentiary hearing "is necessarily deferential to [the] court's factual findings based on its review of live witness testimony." Nash, supra, 212 N.J. at 540. We review any legal conclusions of the trial court de novo. Id. at 540-41. We also apply a de novo standard of review to mixed questions of fact and law. State v. Harris, 181 N.J. 391, 419 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005).

A.

Defendant first argues the PCR court erred by rejecting his claim that his trial counsel was ineffective by failing to inform him that he was exposed to a minimum sentence of thirty years without parole if convicted of murder at trial. See N.J.S.A. 2C:11-3(b)(1). Defendant argues that if he had been so advised, he would have accepted the State's plea offer and not gone to trial.

"A defendant . . . has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'" Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565, 578 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987, 993 (1983); Wainwright v. Sykes, 433 U.S. 72, 93, n.

1, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) (Burger, C.J., concurring)). "Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action." Ibid.

If a defendant alleges prejudice based on allegedly ineffective advice that led the rejection of a plea offer,

a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

[Lafler v. Cooper, 566 U.S. 156, 163-64, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398, 407 (2012).]

In sum, a defendant must show "a reasonable probability that but for counsel's errors he would have accepted the plea." Id. at 171, 132 S. Ct. at 1389, 182 L. Ed. 2d at 412.

We are satisfied the court correctly rejected defendant's claim that his attorney was ineffective by failing to advise him of his minimum sentencing exposure if convicted at trial. The record supports the court's factual determination that trial counsel discussed defendant's minimum sentencing exposure during

their discussion of the State's pre-trial plea offer, and there was no evidence presented to the contrary.

Trial counsel testified he had a discussion with defendant about a plea offer from the State that included a sentencing recommendation of less than ten years. Counsel and defendant discussed the plea offer and whether defendant wanted to accept the offer or proceed to trial. Although counsel did not have a specific recollection discussing the minimum sentence with defendant, counsel testified the minimum sentence "came up at the time that [the State] made the [plea] offer," he could not "conceive of" not telling defendant about his minimum sentencing exposure, and he "would have done it at some point."

Accordingly, the record supports the PCR court's conclusion that trial counsel advised defendant of his minimum sentencing exposure if convicted at trial. The court credited trial counsel's testimony that he would have told defendant about the offer and the thirty-year minimum exposure with a trial, and compared the two options because "it was his practice to do so," and we defer to the court's fact-finding. Nash, supra, 212 N.J. at 540. Thus, defendant did not satisfy his burden of proving by a preponderance of the evidence that his counsel's performance was deficient under the first prong of the Strickland standard.

Moreover, defendant failed to present any evidence showing that if he had been advised of his minimum sentencing exposure, there is a reasonable probability he would have accepted the State's plea offer. Lafler, supra, 566 U.S. at 171, 132 S. Ct. at 1389, 182 L. Ed. 2d at 412. Defendant therefore failed to show he suffered any prejudice as a result of trial counsel's alleged error.

Because defendant failed to satisfy his burden under the Strickland standard, the court correctly rejected his claim that his counsel was constitutionally ineffective by allegedly failing to advise defendant of his minimum sentencing exposure if convicted after trial. Strickland, supra, 466 U.S. at 700, 104 S. Ct. at 2071, 80 L. Ed. 2d at 702; Nash, supra, 212 N.J. at 542; Fritz, supra, 105 N.J. at 52.

B.

Defendant next argues the PCR court erred by rejecting his claim that his trial counsel was ineffective by failing to call Kevin Ford as a witness at trial. Defendant argues Ford would have testified that Lester had a substance abuse problem and was intoxicated at the time he said he witnessed defendant shoot the victim.

When a defendant asserts that his attorney failed to call exculpatory witnesses, "he must assert the facts that would have

been revealed, 'supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification.'" State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999)); see also R. 3:22-10(c).

"Determining which witnesses to call to the stand is one of the most difficult strategic decisions that any trial attorney must confront." State v. Arthur, 184 N.J. 307, 320 (2005).

A trial attorney must consider what testimony a witness can be expected to give, whether the witness's testimony will be subject to effective impeachment by prior inconsistent statements or other means, whether the witness is likely to contradict the testimony of other witnesses the attorney intends to present and thereby undermine their credibility, whether the trier of fact is likely to find the witness credible, and a variety of other tangible and intangible factors. Therefore, like other aspects of trial representation, a defense attorney's decision concerning which witnesses to call to the stand is "an art," and a court's review of such a decision should be "highly deferential."

[Id. at 320-21 (citations omitted) (quoting Strickland, supra, 466 U.S. at 693, 689, 104 S. Ct. at 2067, 2065, 80 L. Ed. 2d at 697, 694).]

The evidence showed that trial counsel's private investigator interviewed Ford prior to trial. Ford stated he knew Lester for over thirty years and had seen Lester drinking alcohol "on the

street all the time," using drugs two to three times a day during the previous two years, and last saw Lester buying drugs the day before the murder. Ford, however, did not have any knowledge that Lester used drugs or alcohol on the day of the murder.

Trial counsel testified that he thought Ford could not establish Lester was under the influence of drugs on the day of the murder because Ford did not have any knowledge that Lester used drugs that day. The PCR court determined trial counsel's decision not to call Ford was a strategic decision, and that defendant failed to demonstrate that his counsel's decision resulted in any prejudice.

Trial counsel attempted to elicit testimony concerning Lester's prior drug use from Bowman Caldwell, who testified during a N.J.R.E. 104 hearing that he had seen Lester drunk and high prior to the day of the murder. Caldwell, however, did not know the last time Lester used drugs prior to the murder and could not testify if Lester was under the influence of drugs at the time the murder was committed. The trial judge excluded the testimony finding it failed to establish a basis to impeach Lester's testimony "as to his observations and [the] clarity of his mind on the date" of the murder.

Ford's putative testimony was substantially similar to Caldwell's testimony that the court ruled was inadmissible. Like

Caldwell, Ford had no knowledge Lester used drugs on the day of the murder or was under the influence of drugs at the time he observed the commission of the murder. The trial judge's exclusion of the Caldwell's testimony concerning Lester's alleged drug use was not challenged on defendant's direct appeal, McCrimmon, supra, slip op. at 5-7, and it could be reasonably anticipated Ford's testimony would be ruled inadmissible for the same reason Caldwell's testimony was excluded – a lack of any knowledge that Lester was under the influence of drugs at the time he observed the murder. Trial counsel's performance was not deficient by failing to introduce evidence the trial court would have rejected as inadmissible. See State v. Worlock, 117 N.J. 596, 625 (1990) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

Even assuming trial counsel should have attempted to present Ford's testimony, the record supports the court's determination that defendant failed to prove that there is a reasonable probability that had Ford testified the result of the trial would have been different. Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Any claim Lester's ability to perceive and relate the events was adversely affected by any purported drug use is belied by the trial record. Caldwell testified defendant entered the barbershop,

asked for the victim, Davis,¹ told Davis they needed to talk, and left with Davis. Caldwell also testified Lester was present in the barbershop when defendant and Davis left, and "[w]ithin minutes" after their departure Lester exclaimed that Davis was being shot outside. McCrimmon, supra, slip op. at 3. Caldwell further testified that Lester said Davis was shot by the person with whom Davis left the barbershop, who was later identified by Caldwell and Lester as defendant. Moreover, Lester's statements to the police following the incident were consistent with the victim's injuries and the physical evidence recovered by the police at the scene. McCrimmon, supra, slip op. at 4-5.

Defendant's trial counsel was not constitutionally ineffective by failing to call witnesses at a hearing whose testimony would not change the outcome. State v. Bey, 161 N.J. 233, 262 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2693, 147 L. Ed. 2d 964 (2000). The PCR court correctly concluded defendant failed to sustain his burden of demonstrating otherwise.

C.

Defendant also argues the PCR court erred by rejecting his contention that trial counsel was ineffective because he failed to challenge Lester's in-court and out-of-court identification of

¹ Davis was known to Caldwell by the nickname "Kojak."

defendant. The PCR court noted that there was conflicting evidence in the trial record as to whether Lester knew defendant prior to the murder, but the court rejected defendant's claim because he failed demonstrate any "impermissible suggestiveness" that would have supported the suppression of Lester's out-of-court identification.

The admissibility of Lester's out-of-court identification of defendant is governed by the standards established by the United States Supreme Court in Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), as adopted by our Supreme Court in State v. Madison, 109 N.J. 223 (1988).² The Manson/Madison standard required a two step analysis:

[A] court must first decide whether the procedure in question was in fact impermissibly suggestive. If the court does find the procedure impermissibly suggestive, it must then decide whether the objectionable procedure resulted in a "very substantial likelihood of irreparable misidentification." In carrying out the second part of the analysis, the court will focus on the reliability of the identification. If the court finds that the identification is reliable despite the impermissibly suggestive nature of the procedure, the identification may be admitted into evidence.

² The out-of-court identifications at issue here occurred prior to our Supreme Court's decision in State v. Henderson, 208 N.J. 208 (2011), which established a new framework for determining the admissibility of such identifications. The Court held that its decision applied prospectively. Id. at 302.

[Madison, supra, 109 N.J. at 232 (citations omitted) (quoting Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968)).]

In order to obtain a hearing on the admissibility of an identification, a defendant is required to show "some evidence of impermissible suggestiveness." State v. Rodriguez, 264 N.J. Super. 261, 269 (App. Div. 1993), aff'd o.b., 135 N.J. 3 (1994). If the court determines at the hearing that the identification procedure "was in fact impermissibly suggestive," it must then consider the reliability of the identification. Madison, supra, 109 N.J. at 232.

The reliability of an identification was dependent on a consideration of five factors: (1) the "opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness's degree of attention"; (3) "the accuracy of his [or her] prior description of the criminal"; (4) "the level of certainty demonstrated at the time of the confrontation"; and (5) "the time between the crime and the confrontation." Id. at 239-40 (quoting Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154). The factors "must be weighed against the corrupting effect of the suggestive procedure." Id. at 240.

Here, defendant failed to present any evidence that Lester's out-of-court identification was the result of any impermissible

suggestiveness. In contrast, Lester testified he was shown six pictures, told to pick out a picture if he recognized the person he described as the shooter, and then selected defendant's picture. He testified he was not threatened or coerced and was not told to select a certain picture.

Accordingly, trial counsel's failure to challenge Lester's out-of-court identification of defendant did not "[fall] outside the wide range of professionally competent assistance considered in light of all the circumstances of the case," Allegro, supra, 193 N.J. at 366, because there was no basis to challenge Lester's out-of-court or in-court identification of defendant. In addition, defendant failed to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel." Worlock, supra, 117 N.J. at 625; see also State v. O'Neal, 190 N.J. 601, 619 (2007) (holding that counsel was not ineffective by failing to file a meritless motion).

D.

We also reject defendant's contention that his trial counsel was ineffective by failing to memorialize a pre-trial interview he conducted of Caldwell. Defendant argues that Caldwell said in

the interview that Lester was "high on a daily basis," but testified at trial that Lester "was not high that day or week," and that had trial counsel memorialized the interview, trial counsel could have confronted Caldwell with this contradictory statement.

At the PCR hearing, however, trial counsel testified that he interviewed Caldwell, who said Lester consistently used drugs but could not testify that Lester used drugs on the day of the shooting. Trial counsel also explained he did not memorialize the statement because he did not want supply a document to the State that could be used to cross-examine Caldwell.

There was no evidence presented supporting defendant's contention that Caldwell said in the interview that Lester was "high on a daily basis." Trial counsel, who conducted the interview, did not testify Caldwell made the statement and defendant presented no affirmative evidence that Caldwell made such a statement during trial counsel's interview. In addition, as the PCR court correctly found, trial counsel made a strategic decision not to create a document that could be used by the State to cross-examine Caldwell, and thus, defendant failed to show his counsel's decision "fell outside the wide range of professionally competent assistance considered in light of all the circumstances of the case." Allegro, supra, 193 N.J. at 366. Last, defendant

failed to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

E.

Defendant argues trial counsel was ineffective by failing to object to certain alleged improper and prejudicial remarks made by the prosecutor during summation.³ Defendant argues "[h]ad trial counsel objected to the improper comments made by the prosecutor, the standard of appellate review [on these issues] would not have been plain error" on appeal.

We reject defendant's contention because even assuming his counsel erred by failing to object to certain of the prosecutor's statements, defendant did not prove prejudice under the Strickland standard. Defendant correctly argues that trial counsel's failure to object resulted in the appellate review of the prosecutor's statements under the plain error standard instead of the harmless error standard. See R. 2:10-2.

³ The trial record shows that trial counsel made frequent objections during the prosecutor's summation. Defendant's argument here is limited to those few comments made by the prosecutor about which his counsel did not object. We discussed all of the challenged prosecutor's comments, and trial counsel's objections and lack of objections to them, in our decision on defendant's direct appeal. McCrimmon, supra, slip op. at 9-29.

Application of the plain error and harmless error rules require an identical determination of whether the error is "clearly capable of producing an unjust result." R. 2:10-2. Our Supreme Court has "made clear that '[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature.'" State v. Colbert, 190 N.J. 14, 30 (2007) (quoting R. 2:10-2). The Court explained:

[t]he use with respect to 'harmless error' of the same formula we had stated for 'plain error' was simply an acknowledgment that after all was said, the question for the appellate court was simply whether in all the circumstances there was a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits

[Id. at 30-31 (quoting State v. Macon, 57 N.J. 325, 338 (1971)).]

Thus, application of the plain error standard did not result in any prejudice to defendant in our review of defendant's challenge to the prosecutor's statements on direct appeal. In addition, we found that the prosecutor's statements were not improper and did not deprive defendant of his right to a fair trial. McCrimmon, supra, slip op. at 9-29. Again, defendant's failure to establish by a preponderance of the evidence that there is a reasonable probability he suffered any prejudice as the result of his counsel's purported errors required the court's rejection

of his claim. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

F.

We also reject defendant's contention the PCR court erred by rejecting his claim that his trial counsel failed to adequately explain the ramifications of his decision not to testify at trial. Trial counsel's testimony, which the court found credible, provides ample support for the PCR court's finding that counsel discussed with defendant the potential ramifications of defendant's decision not to testify. There is no evidence to the contrary. As a result, defendant did not prove his counsel's performance was deficient.

Moreover, the trial record shows that the court questioned defendant concerning his decision not to testify. Defendant stated he did not wish to testify, he had sufficient time to consider his decision, and he made that decision of his own free will. Defendant also failed to present any evidence that had his attorney fully informed him concerning the ramifications of his decision not to testify, he would have opted to waive his right to remain silent and testified at trial. Again, defendant failed to prove either prong of the Strickland standard. The court therefore correctly rejected his claim. Id. at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

G.

Any arguments made by defendant that have not be addressed are without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(2). We note only that defendant offers no basis supporting his request for a remand to the PCR court to provide him with the opportunity to testify. The evidentiary hearing in this matter was completed, a final order was entered, and for the reasons stated we are convinced the court correctly denied defendant's PCR petition.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION