SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2938-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

C.A.M.,

Defendant-Appellant.

Argued January 10, 2018 – Decided May 15, 2018

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 13-04-0344.

Steven F. Wukovits argued the cause for appellant (Triarsi, Betancourt, Wukovits & Dugan, LLC, attorneys; Steven F. Wukovits, of counsel and on the brief).

Meredith L. Balo, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Ann M. Luvera, Acting Union County Prosecutor, attorney; Meredith L. Balo, of counsel and on the brief).

PER CURIAM

Union County Indictment No. 13-04-0344 charged defendant C.A.M. with three counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(2) (counts one, two, and three); three counts of second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1) (counts four, five, and six); three counts of second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4) (counts seven, eight, and nine); and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count ten). Tried by a jury on the indictment, defendant was convicted of a lesser-included third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a) (count three); two counts of lesser-included fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) (counts six and nine); and second-degree child endangering, N.J.S.A. 2C:24-4(a)(1) (count ten). He was acquitted of the remaining charges.

Defendant was sentenced by the trial judge on February 5, 2016, to a six-year term of imprisonment on the second-degree offense, a concurrent four years on the third-degree crime, and concurrent one-year terms on the fourth-degree charges. Defendant appeals; his claims all relate to ineffective assistance of counsel. Thus, they should be resolved by way of a post-conviction relief application, not on direct appeal. See R. 3:22. We affirm.

Defendant is the father of J.M., who moved from out of state into her father's home in 2010. During the trial, she testified that defendant's demonstrations of affection troubled her since her arrival, including kissing on the neck and on the chest. After hearing that J.M. had sex with her ex-boyfriend, defendant physically assaulted her on July 19, 2012. At that point, J.M. was fourteen years old.

J.M. testified that the following morning, on July 20, defendant pulled down her pants in order to "check" her for sexually transmitted diseases, and instructed her to open her vagina wider because he could not see anything. Later on that day, defendant took J.M. to a sex store and bought her a dildo. When they arrived home, he insisted that she use it. When J.M. objected, he promised to leave the room if she would do so. Defendant eventually took it from her, pushed the covers she was hiding under to the side, and forcefully rubbed it on her. J.M. testified that he also began to touch her with his fingers, penetrating her vagina. During this confrontation, defendant unzipped his pants, took out his penis, and attempted to have his daughter touch him. He also attempted to put his mouth on her chest, but J.M. pushed him away.

The following day, J.M. told a twelve-year-old relative about the incident. The relative, who also testified, described J.M. as tearful and "broken down" when describing what had occurred.

Plainfield Police Detective Carlos Gonzalez interviewed defendant on July 25, 2012. Gonzalez did not use an interpreter, but gave defendant a Spanish language Miranda[1] waiver form to follow while reviewing his rights. Gonzalez conducted the interview in English; at times, defendant would respond in Spanish to questions posed in English.

Defendant admitted taking his child to the store and purchasing the item, but said she did not object. He added that when they got home, J.M. took it upstairs while he remained downstairs, and when she came down and said she did not like it, he simply threw it away.

When he testified at trial, defendant's version of events did not significantly differ from the interview narrative. He said that the idea to purchase his daughter a sex toy so that she would not be sexually active came from his wife, who had gotten the idea from a coworker. Defendant denied engaging in any sexual conduct.

During the Miranda hearing, counsel informed the judge that he did not intend to ask any questions of Gonzalez. The judge

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

asked the witness a number of questions, including the reason he did not conduct the entire interview in Spanish; the detective acknowledged that, in retrospect, he should have done so.

At the Miranda hearing, counsel said he wanted the statement to come in, but had concerns regarding differences in the "dialect" used by defendant, who was from Honduras, as opposed to the detective, whose family came from Puerto Rico. Counsel reiterated that he wanted to argue to the jury regarding certain questions because defendant may have been confused about what he was being asked. He said "this is more trial strategy than anything."

Shortly thereafter, trial counsel reiterated that he was not "arguing the ultimate Miranda element here that we traditionally argue. I just want to be able to say it in front of a jury which I think is legitimate."

In her ruling regarding Miranda, the trial judge found the State had proven beyond a reasonable doubt that defendant understood his rights and knowingly waived them, in part because she found the detective credible. No argument was made by defense counsel, other than to reiterate that he intended to argue to the jury that the problem was the difference between the Spanish spoken by the detective and defendant.

On appeal, defendant raises the following points:

POINT I

THE DEFENDANT WAS DEPRIVED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DUE TO [TRIAL COUNSEL'S] CONDUCT.

I. Trial Attorney Failed to Properly Prepare for Trial.

II. Trial Attorney Failed to File Pre-Trial Motions and Briefs.

a. Miranda Hearing.
b. The 104 Hearing as to Mrs. [P.'s] Testimony.
c. The Fresh Complaint Doctrine.
d. Psychological Records.
e. Immigration Status of Alleged Victim.

III. Trial Attorney's Overall Conduct.

"Our courts have expressed a general policy against entertaining ineffective assistance of counsel claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record." State v. Castagna, 187 N.J. 293, 313 (2006) (quoting State v. Preciose, 129 N.J. 451, 460 (1992)). Each and every argument counsel is making on this direct appeal requires exploration of the trial attorney's trial strategy and decision-making process. It is alleged, without any record to support it, that on each of the several important stages——before the trial and while the trial was ongoing——counsel failed to prepare a brief, failed to file motions, failed to investigate, and generally failed to take steps to refute the State's case.

To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's representation was so deficient that the attorney was not functioning as the "'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984). A defendant must also show that the deficient performance actually prejudiced the outcome——that but for these "unprofessional errors, the result of the proceeding would have been different." Id. at 694. It is simply not possible to fairly assess the claim on this record.[2] Preciose, 129 N.J. 451, 460 (1992). The Castagna principle holds true today, particularly in this case where such serious allegations are made. Accordingly, we do not address the points on appeal, but leave it to defendant to file the appropriate application.

Affirmed.

[2] This attorney argued at sentencing that prior counsel sent him only "twenty-two pages of handwritten notes" when he asked that the file be turned over. The appellate brief asserts trial counsel was previously suspended. The documents purporting to support the allegation, along with the suspension order, are included in the appendix, but they were obviously not included in the trial record. Cherry Hill Dodge, Inc. v. Chrysler Credit Corp., 194 N.J. Super. 282 (App. Div. 2015) (dismissing the appeal because of numerous procedural deficiencies, including appendix inclusion of material outside of the record).