SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3631-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANKLIN PRATHER,

Defendant-Appellant.

Argued October 2, 2017 – Decided February 21, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 06-10-1015.

Brian D. Driscoll, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Brian D. Driscoll, on the brief).

Milton S. Leibowitz, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Thomas K. Isenhour, Acting Union County Prosecutor, attorney; Milton S. Leibowitz, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Franklin Prather of the July 3, 2006 felony-murder of a well-known local contractor. State v. Franklin Prather, No. A-3221-08 (App. Div. May 13, 2013) (slip op. at 2).[1] To place the issues raised on appeal in context, we review some of the trial evidence by referring to our prior opinion.

Defendant's co-defendant, Maurice Knighton, pled guilty and was a key witness at trial. Prather, slip op. at 2, 15-17. Knighton claimed defendant supplied the murder weapon, a gun which defendant kept at his father's house. Id. at 15. Before the murder, defendant and Knighton went to a CVS store and purchased duct tape, to bind the victim, and stockings to use as masks. Id. at 16. The jury saw CVS surveillance tapes which, along with testimony and store records, timed the purchases and corroborated Knighton's testimony. Ibid.

Defendant's cousin testified and corroborated the purchase of the stockings. Id. at 17. He also confirmed that defendant obtained a gun from his father's home before the murder, and that shortly after the shooting, defendant and Knighton came to a house

[1] Although citing an unpublished opinion is generally forbidden, we do so here to provide a full understanding of the issues presented and pursuant to the exception in Rule 1:36-3 that permits citation "to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law." See Badiali v. N.J. Mfrs. Ins. Grp., 429 N.J. Super. 121, 126 n.4 (App. Div. 2012), aff'd, 220 N.J. 544 (2015).

frequented by drug users. Id. at 18. Defendant was nervous and sweating; Knighton had blood on his shirt. Ibid.

Defendant's father, Franklin Prather, Sr. (Franklin Sr.), was an important State's witness:

> Franklin Sr. reluctantly testified against his son. He had previously seen two guns in the garage of the property . . . that his family owned and from which he was vacating during the weeks leading up to July 3, 2006. He knew defendant "had a weapon." One of the guns Franklin Sr. saw was a revolver, but it was smaller than his own .357 Magnum revolver.
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> Defendant called him several nights in a row immediately before the murder, asking about things that Franklin Sr. had moved from the house . . . . Defendant asked for his gun and bullets. On Friday or Saturday before the murder, defendant called Franklin Sr., angry because he could not find some of the things he wanted. That night, Franklin Sr. gave defendant some brown bags and some boxes taken from [the] house. Although he had previously admitted to detectives that he knew defendant's gun was in one of the brown bags, Franklin Sr. testified at trial that he was not sure.
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> [Id. at 18-19.]

Union Township Detective William Fuentes took statements from defendant, his father, his cousin and Knighton. Id. at 5-7. The judge denied defendant's motion to suppress his statements, id. at 8, and, although defendant never admitted his involvement, the

State introduced the statements and argued they were inconsistent with other evidence. Id. at 15.

We affirmed defendant's conviction and sentence on direct appeal. Id. at 4. The Supreme Court denied defendant's petition for certification. 216 N.J. 430 (2013).

Defendant filed a pro se petition for post-conviction relief (PCR) alleging the ineffective assistance of counsel (IAC). PCR counsel was appointed, and he filed a brief, amended petition and supplemental letter brief. The supplemental petition was supported by affidavits from three women. In identical language, each affiant stated she had attended the trial and, "[d]uring one of the proceedings," had observed juror number nine "with her head hanging down in a nod position – possibly sleeping." Each affiant said she told defendant of her observations.

There were also three affidavits from defendant. He claimed that he wanted to testify on his own behalf at trial, but his attorney advised against it and told him to tell the judge, when asked, that he (defendant) elected not to testify. In the second affidavit, defendant said counsel told him during trial that the battery in his hearing aid was faulty and he (counsel) did not "hear everything." In the third affidavit, defendant stated that his family had retained private counsel but were unable to pay the balance of the retainer because the police department

"seiz[ed] . . . funds from [his] family during the investigation." As a result, defendant's "opportunity to secure counsel of choice failed." Franklin Sr. also filed an affidavit attesting to having retained private counsel for his son and corroborating the seizure of family funds during the investigation.[2]

In addition, defendant attached two statements taken by police. The statement of D.W., a juvenile at the time, was taken on July 6, 2006. D.W. said he saw Knighton with a revolver two or three nights earlier, and Knighton said he was looking to rob someone. The second statement was that of another juvenile, J.B., taken in October 2006. J.B. said he saw Knighton two times on the night of the murder, and that he had a revolver with him both times. On one occasion, J.B. saw Knighton getting into defendant's truck.

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[2] The appellate record also contains an affidavit from defendant's wife, stating that Knighton twice called her from the jail shortly after the murder and his arrest. In both calls, Knighton told her that defendant was not involved in the crime.

Those portions of the pro se brief defendant filed with the PCR court, which are in the appellate record, make no argument regarding this affidavit. The judge did not reference this affidavit or address any argument about the affidavit in his written opinion. We generally refuse to consider issues not presented to the trial court. State v. Robinson, 200 N.J. 1, 20 (2009).

Because defendant's appellate brief makes no argument regarding this affidavit, we deem such issue to have been waived. Seeward v. Integrity, Inc., 357 N.J. Super. 474, 479 n.3 (App. Div. 2002).

At oral argument on the petition, PCR counsel only asked the court to consider the arguments made in his and defendant's pro se briefs and requested an evidentiary hearing. He otherwise submitted on the papers.[3] In a written opinion, the PCR judge, who was also the trial judge, denied the petition without an evidentiary hearing.

Before us, defendant raises the following arguments:

> POINT I
>
> THE COURT ERRED IN DENYING AN EVIDENTIARY HEARING.
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> POINT II
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> COUNSEL WAS INEFFECTIVE IN COERCING DEFENDANT TO GIVE UP HIS RIGHT TO TESTIFY.
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> POINT III
>
> COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO DETECTIVE FUENTES REMAINING IN THE COURTROOM DURING TESTIMONY OF STATE'S WITNESSES, AND THE COURT ERRED IN NOT ADDRESSING THE CLAIM.
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> POINT IV
>
> THE COURT ERRED IN FINDING COUNSEL NOT INEFFECTIVE FOR FAILING TO CALL [D.W.] AND [J.B.] AS WITNESSES.

[3] Although defendant's pro se submissions are in the appellate record, whatever was submitted by PCR counsel, except for defendant's supplemental certification, is not. However, in his written decision, the judge summarized the arguments made by PCR counsel in his brief.

POINT V

THE COURT ERRED IN FINDING COUNSEL NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE RELEVANCE OF THE CVS LOSS PREVENTION PURCHASE REPORT.

POINT VI

THE COURT ERRED IN FINDING COUNSEL NOT INEFFECTIVE FOR FAILING TO BRING TO THE COURT'S ATTENTION THE BEHAVIOR OF JUROR NO. 9.

POINT VII

COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO THE RESPONSE TO THE JURY NOTE AND APPELLATE COUNSEL WAS INEFFECTIVE IN ARGUING THE ISSUE.

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 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 52 (quoting Strickland, 466 U.S. at 687).

Second, a defendant must prove he suffered prejudice due to counsel's deficient performance. Strickland, 466 U.S. at 687. A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, 105 N.J. 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, 466 U.S. at 694; Fritz, 105 N.J. at 52). We apply the same standard to a 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. (1987)).

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 (1997)).

We conclude the arguments made in Points II, III, V, VI and VII lack sufficient merit to warrant extensive discussion in a written opinion. R. 2:11-3(e)(2). We add only the following.

The record belies any claim that trial counsel coerced defendant into not testifying. Defendant argues it was improper for Detective Fuentes, who remained in the courtroom to assist the assistant prosecutor, to hear the testimony of other witnesses before the State recalled Fuentes as a witness. However, the PCR judge properly concluded that defendant failed to show how this prejudiced the defense. The examples defendant offers in his brief are entirely unpersuasive.

Defense counsel's failure to object to the testimony and records regarding the CVS purchases does not demonstrate deficient performance. As the PCR judge found, the evidence was highly relevant and properly admitted at trial. See State v. Worlock, 117 N.J. 596, 625 (1990) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

The PCR judge rejected defendant's claim about a sleeping juror. He noted "[t]here is nothing in the record that indicates a juror was repeatedly sleeping." 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). The judge concluded the three affidavits were unpersuasive because, among other things, they failed to "mention . . . how long or short a period of time the alleged sleeping went on and all use[d]

the term 'possibly sleeping.'" We agree with the judge's conclusions.

On direct appeal, defendant argued the judge erred in responding to a jury request for playback of several witnesses' testimony. Prather, slip op. at 3. We concluded that the judge should have solicited comments from counsel as to how to respond before responding, but we found no error in the judge's actual response. Id. at 30. In short, appellate counsel was not deficient because she actually did raise this issue on direct appeal, and trial counsel did not render deficient performance by failing to object, because there was no error in the judge's response to the jury's request. Worlock, 117 N.J. at 625.

In Point IV, defendant argues trial counsel provided ineffective assistance because he failed to call D.W. and J.B. as witnesses at trial. According to J.B.'s statement, Knighton had a gun before the murder, which was inconsistent with Knighton's testimony at trial. Prather, slip op. at 17. However, the PCR judge correctly observed that J.B.'s statement placed an armed Knighton and defendant together in defendant's truck on the day of the murder. That testimony would have been, as the judge noted, "very inculpatory."

Additionally, R.B., J.B.'s mother who witnessed the statement her son gave to police, testified at trial as a State's witness.

R.B. testified that she saw Knighton with a gun on the night of the murder and he was getting into a car with defendant. There was no reason for defense counsel to call J.B., whose testimony would have been cumulative and inculpatory.

D.W. told police that he saw Knighton with a gun a few nights before July 6, 2006, and Knighton was looking to rob someone. At trial, Knighton admitted shooting the victim during a planned robbery and having the gun after the shooting. Prather, slip op. at 15-17. The decision not to call D.W. as a witness fails to support any claim that counsel's performance was deficient.

Affirmed.