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Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4649-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.R.D.,

Defendant-Appellant.

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Submitted December 20, 2017 – Decided April 5, 2018

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Indictment No.  
06-02-0120.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Steven M. Gilson, Designated  
Counsel, on the brief).

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

PER CURIAM

This is an appeal from the trial court's denial of defendant's petition for post-conviction relief (PCR). Defendant requests the following relief for the following reasons:

DEFENDANT'S CONVICTIONS MUST BE REVERSED DUE TO TRIAL COUNSEL'S INEFFECTIVENESS OR, IN THE ALTERNATIVE, THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE A PRIMA FACIE CASE OF INEFFECTIVENESS WAS ESTABLISHED.

A. Trial Counsel Failed To Pursue The Conflict Of Interest That An Attorney Who Testified As A State's Witness And Who Represented A State's Witness Also Had Represented Defendant In The Instant Matter.

B. Trial Counsel Misadvised Defendant As To Whether Or Not To Testify.

C. Trial Counsel Failed To Strike The Juror Who Equivocated As To Being Impartial If Defendant Chose Not To Testify.

Finding defendant's arguments meritless, we affirm the order that denied his PCR petition.

We detailed the State's trial proofs in our opinion affirming defendant's convictions and sentence on direct appeal, State v. J.R.D., No. A-3476-08 (App. Div. Nov. 2, 2012) (slip op. at 2-6), certif. denied, 214 N.J. 117 (2013), and need not repeat them here in their entirety. Suffice it to say that during defendant's trial, his pre-adolescent daughter described in graphic detail and

illustrated with anatomic dolls how defendant had put his tongue in her mouth, fondled her chest and buttocks, digitally penetrated her, and then told her to keep what he did a secret or he would "whop" her.

A jury convicted defendant of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1), second-degree sexual assault, N.J.S.A. 2C:14-2(b), and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a).<sup>1</sup> For those crimes, the trial judge sentenced defendant to serve, respectively, a twenty-year prison term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, a concurrent ten-year prison term subject to NERA, and a consecutive five-year prison term. The judge also placed defendant on parole supervision for life and ordered him to comply with Megan's Law's registration and reporting requirements.

As mentioned, we affirmed defendant's convictions and sentence. A month after the Supreme Court denied certification, defendant filed his PCR petition and later amended it. In his initial petition, defendant alleged his trial counsel had been ineffective for failing to do the following: request a Michaels<sup>2</sup> hearing to challenge the reliability of his daughter's testimony,

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<sup>1</sup> This was defendant's second trial. The first trial ended in a mistrial when the jury was unable to come to a unanimous verdict.

<sup>2</sup> State v. Michaels, 136 N.J. 299 (1994).

object to his daughter's videotaped statement to police, object to portions of the jury charge, and object to certain statements the prosecutor made in summation.

In his amended petition, defendant alleged the trial judge's instructions to the jury were wrong, the prosecutor engaged in misconduct, and his sentence was excessive. In addition, defendant alleged the prosecutor did not present exculpatory evidence, improperly coached his daughter, and committed other misconduct. Defendant asserted his attorney failed to present the testimony of witnesses who would have provided favorable testimony for him.

Defendant also claimed a public defender who had once represented him in the case represented a witness and testified for the prosecution at his second trial. Defendant added that jurors equivocated about how they would feel if he did not testify, his trial attorney had coerced him into not testifying at the second trial, and he was entitled to an evidentiary hearing. Defendant asserted his trial counsel was ineffective for not objecting when these alleged errors occurred at trial.

The judge who presided over both trials heard oral argument on defendant's PCR petition and denied it without a hearing. In the opinion he delivered from the bench on April 29, 2016, the judge disposed of each of defendant's arguments. Addressing the arguments defendant now raises on appeal, the judge first

determined defendant's assertion concerning an alleged conflict of interest did not warrant a hearing. The judge acknowledged the public defender in question was "briefly involved" in defendant's case. She was involved for a "week or two" between the first and second trials. The court stated: "There was very little activity between [the public defender] and defendant. There's no evidence that [the public defender] relayed any information to the prosecutor or to the [c]ourt."

Next, the judge explained the record refuted defendant's claim that trial counsel coerced him not to testify at the second trial. Pointing out defendant did not state in his PCR petition what he would have said had he testified, the judge commented that even if defendant had testified and proclaimed his innocence, "a bald assertion of innocence would have been buried by the magnitude of evidence presented in this case."

Last, the judge rejected defendant's arguments concerning the jurors. Of the two jurors defendant accused of expressing reservations about his right not to testify, his attorney struck one. As to the other, the judge recounted how he had explained the historical basis for the Fifth Amendment, given an example, and "charged extensively that [jurors] couldn't use this." The judge characterized as a bald assertion defendant's argument that one juror influenced the other jurors.

To prove ineffective assistance of counsel, a defendant must satisfy the Strickland two-part test by demonstrating "counsel's performance was deficient," that is, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); accord, State v. Fritz, 105 N.J. 42, 58 (1987). When defendants establish a prima facie claim of ineffective assistance of counsel, they are entitled to a hearing on their claims. State v. Preciose, 129 N.J. 451, 462 (1992); R. 3:22-10(b).

Considering defendant's claims in light of these principles, we find, as did the trial court, defendant failed to establish a prima facie case that his trial counsel was ineffective. We first address defendant's argument his counsel failed to pursue a claim that a public defender who formerly represented defendant and testified for the State had a conflict of interest.

This is the context. Defendant and the victim's mother did not live together. The mother, her friend (the friend), and the friend's fiancée lived in the same residence. The day after the victim said the assault occurred, she told the friend. The friend

did not testify at defendant's first trial but testified at his second trial.

In January 2007, the friend was arrested for, and pled guilty to, possession of a controlled dangerous substance (CDS). She was represented by a public defender. Following defendant's first trial, the same public defender briefly represented defendant.

During the second trial, on October 16, 2007, the mother's friend recounted what the victim had told her about the assault, admitted to pleading guilty to a CDS charge in January the same year, and identified the public defender who represented her. The friend testified she had not told the public defender about her involvement in this case, nor did she seek or get any special treatment concerning the CDS offense because she would be a witness against defendant.

Following the friend's testimony at defendant's second trial, the prosecutor who handled the friend's CDS charge and the public defender both testified and confirmed the friend received no special treatment. In fact, both the prosecutor and public defender testified they had been unaware of the friend's involvement in defendant's case until the prosecutor handling defendant's case had subpoenaed or contacted them approximately two weeks before they testified.

In contrast to the public defendant's testimony, defendant alleged in his PCR petition:

Petitioner's first trial ended in a mistrial in February 2007. Petitioner believes it was because [the friend] failed to appear in court. Petitioner discovered that she was arrested because of warrants and eluding police. Two weeks after the mistrial, [the public defender] visited [p]etitioner and claimed that [his first defense attorney] had discontinued his services as his attorney and she was replacing him. She claimed to be quite familiar with the trial and the "new" case. (There were new charges conjured up by the prosecutor that were dropped after the conviction.) Petitioner contacted [his first defense attorney] who said that he was still his attorney. He wrote to the [public defender] and cancelled his public defender application.

On July 19, 2007, [the public defender] visited [p]etitioner and insisted that [his first defense counsel] was not his attorney and she was taking over the cases. She persuaded him to believe her. He explained that the first case ended because [the friend] failed to appear. [The public defender] asked him, strangely, whether he was on medication. He told her he was taking one pill in the morning for blood pressure. The consultation ended abruptly with [the public defender] stating that she would see him in two or three months.

On October 1, 2007, [p]etitioner met [the public defender] at a court hearing and she told him, with a grin on her face, that she could no longer represent him because she was going to be a witness for the assistant prosecutor in the retrial. On October 16, 2007, in the middle of the retrial, [the public defender] and [the assistant prosecutor



who handled the friend's CDS charges and plea] testified that they did not make any deals with [the friend] to be released early from jail to testify. Petitioner realized that he had previously mentioned [the friend to the public defender], and she had been masquerading as his attorney to obtain inside information for [the victim's mother] to use at the retrial.

When the alleged victim's mother testified, she began to say that the alleged victim said that [p]etitioner took some pi . . . (pills) but failed to complete the statement. The alleged victim testified that [p]etitioner took some pills before assaulting her. She had not mentioned this in her video-statement . . . nor at the first trial. . . .

Defendant now claims his trial counsel was ineffective for failing to pursue the public defender's conflict of interest. We disagree, though for different reasons than those expressed by the trial judge. The trial judge determined there was "no evidence [the public defender] relayed any information to the prosecutor or to the [c]ourt."

Of course, it is unlikely defendant would have direct evidence of such even if the public defender had done so. But defendant established inferentially - through his assertions about the public defender probing him about the pills and the mother's and victim's "new" testimony about pills at the second trial - that the public defender had betrayed defendant's confidences to the friend. And though the public defender's and previous prosecutor's

testimony at the second trial contradicted defendant's verified PCR petition, the trial court was not in a position to reject defendant's assertions without assessing his credibility at a hearing.

Nonetheless, there was a fatal flaw in defendant's argument. Defendant never asserted he informed his trial attorney about the alleged conflict. He made no such allegation in his PCR petition and he cited to nothing in the trial record that establishes he informed trial counsel of the conflict when the public defender testified at trial.

In his PCR petition, defendant alleged he first met with the public defender in February 2007, approximately two weeks after the first prosecution ended in a mistrial. According to the petition, nothing happened other than the public defender saying she now represented defendant. Defendant did not say he discussed anything with her. Instead, defendant asserted, "[p]etitioner contacted [his first defense attorney] who said that he was still his attorney. He wrote to [the public defender] and cancelled his public defender application."

It is not clear from the quoted assertion whether defendant or his trial attorney wrote to the public defender and cancelled the application. Nonetheless, after the letter was sent to the public defender, the issue appeared to be settled and over.

Defendant next explained in his PCR petition how the public defender came to see him again in July and persuaded him she now was his attorney. During the meeting, defendant allegedly confided in the public defender and provided the information that he implies she gave to the witness who testified against him at trial. But defendant never says he told his trial attorney about this July meeting when it happened. Nor does defendant explain where his attorney was when the public defender allegedly told defendant in October, in court, she would be testifying for the State. And defendant does not claim that when he realized after the public defender testified at trial she had betrayed his confidences, he told his attorney what had taken place.

Defendant cites to nothing in the trial record that establishes he told his attorney that the testifying public defender had approached him again after his application for the public defender had been "cancelled." If defendant did tell his trial counsel, he does not explain why his attorney took no action. In short, defendant has based his argument on bald assertions devoid of any evidence his trial attorney even knew about defendant's July and October meetings with the public defender. Such bald assertions are inadequate to support an ineffective-assistance claim. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Defendant's argument that his attorney coerced him into not testifying and his argument concerning a juror harboring bias are without sufficient merit to warrant discussion. R. 2:11-3(e)(2). We add only the following brief comments.


The record demonstrates defendant, not his attorney, made the decision not to testify. In response to the court's questions, defendant acknowledged that though his attorney had advised him on the issue, it was his, defendant's, decision. Defendant said he understood he was not bound by his attorney's advice. Defendant also said he had made the decision voluntarily, that is, on his own. Moreover, defendant has not submitted an affidavit detailing exactly what his attorney told him or how his attorney's advice affected his decision. In other words, defendant has made nothing more than a bald assertion, which, as we have explained, is insufficient to establish an ineffective-assistance-of-counsel claim. Cummings, 321 N.J. Super. at 170.

Defendant's argument that trial counsel was ineffective for not striking a juror "who equivocated as to being impartial if defendant chose not to testify" is also unavailing. Defendant has constructed his argument by mischaracterizing the trial judge's colloquy with the juror and by taking the juror's statements out of context. In response to the court's question, "[d]o you understand that a defendant in a criminal trial does not have to

prove his or her innocence, does not have to present any evidence, does not have to testify, does not even have to be present during the trial," the juror said she would be able to follow all of those principles. Although the juror expressed her personal views about what a defendant might want to do to defend himself, she was clear that if defendant elected not to testify, she would not hold his decision against him. The trial judge quite properly rejected defendant's argument about the juror.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION