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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0880-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NICHOLAS F. WELCH,
a/k/a NICHOLAS WELCH
and NICK WELCH,

Defendant- Appellant.

Submitted December 7, 2022 – Decided July 19, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 11-09-1648.

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

Theodore N. Stephens II, Acting Essex County
Prosecutor, attorney for respondent (Caroline C. Galda,
Special Deputy Attorney General/Acting Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

This matter returns to us after remand. Defendant Nicholas Welch appeals from the August 10, 2021 Law Division order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. Because the reasons expressed in the PCR judge's comprehensive oral opinion are supported by sufficient credible evidence in the record, we affirm for the reasons set forth below.

I.

We incorporate the procedural and factual history from our opinion affirming defendant's conviction and sentence on direct appeal. State v. Welch, No. A-5950-13 (App. Div. Nov. 14, 2016). We need not repeat them here.

In 2014, a jury convicted defendant of first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and 2C:11-3(a)(1) and (2); first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count two); four counts of first-degree attempted murder, N.J.S.A. 2C:5-1 and 2C:11-3(a) (counts three, four, five and six); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count seven); second-degree unlawful possession of a firearm without a permit, N.J.S.A. 2C:39-5(b) (count eight); second-degree possession of a weapon for an unlawful purpose, N.J.S.A.

2C:39-4(a) (count nine); and second-degree burglary armed with a deadly weapon, N.J.S.A. 2C:18-2(b)(1) (count ten).

After mergers, defendant was sentenced to life imprisonment subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and the Graves Act, N.J.S.A. 2C:43-6; four consecutive twenty-year prison terms; and a ten-year prison term also subject to NERA and the Graves Act.

Thereafter, defendant filed his first PCR petition which was denied by the trial court. On appeal, we remanded for an evidentiary hearing to explore trial counsel's decision not to call Isaiah Kelly as a witness. State v. Welch, No. A-0116-18 (App. Div. Mar. 11, 2020). Among the issues raised, defendant challenged trial counsel's failure to have Isaiah Kelly testify at trial as an exculpatory witness. Following remand, the PCR judge presided over an evidentiary hearing which took place on June 4, 2021, and July 30, 2021.

The judge addressed defendant's argument that Kelly, as an exculpatory witness, was not called by trial counsel to testify at the time of trial. The judge considered testimony from Kelly, defendant, Detective Holt Walker, and defense counsel, Thomas Cataldo, addressing each witness in turn.

Kelly testified virtually because he was incarcerated in North Carolina.¹ Kelly testified that he was not present when the shooting occurred on September 25, 2010. He recounted information relayed to him from co-defendant Marcus Bascus,² on September 26, 2021, the day after the shooting. Bascus acknowledged he was the shooter and stated he thought he had killed five or six people.

Kelly testified that Bascus told him Bascus bumped into defendant, who was "drunk," on the street after defendant had a "fight" when he attempted to enter a house party hosted by college fraternity students. Bascus said he and defendant walked back to the party. Kelly testified he "guess[ed] Bascus brought a gun with him." Kelly also stated when Bascus and defendant arrived at the house, he "guessed" Bascus gave the gun to defendant so he could "handle his business." Defendant fired a "warning shot" into the air after they arrived at the house. Bascus grabbed the gun from defendant because "he was not satisfied with [the warning shot]." Kelly was uncertain if one or both defendant and Bascus tried to push the door open to enter the party as the college students

¹ Kelly was serving fourteen to eighteen years for statutory rape in North Carolina.

² Bascus was tried and convicted in a separate trial.

attempted to close the door. Bascus "stuck his hand in the door" and "randomly" fired his gun in the house. Bascus and defendant then ran away from the house. Bascus told Kelly he "got rid of" the gun but did not specify how.

The judge did not find Kelly to be a credible witness. He determined Kelly's testimony based on Bascus's admissions were "secondhand comments," "grossly inconsistent," and "differed substantially" from defendant's version of events which "would have been undermined by effective cross examination." He stated, "[I]f Kelly were called, he could be impeached . . . [his] testimony would . . . prov[e] . . . the State's case beyond a reasonable doubt" The judge also found while Kelly's testimony did not establish defendant committed murder, the testimony proved the State's case against defendant as to accomplice liability, murder, and conspiracy.

During his testimony, defendant acknowledged entering the party and getting into a fight. He then testified that he was thrown out and handed a weapon by Isaac Muldrow. Defendant further admitted discharging the gun into the air. Additionally, defendant testified when Bascus entered the house, he ran from the area when the shooting occurred.

In evaluating defendant's and Kelly's testimony, the judge found the versions "differ[ed] substantially." The judge concluded Kelly's testimony

"severely and factually" contradicted defendant's testimony. The judge recounted defendant's and Kelly's testimonies, noting the contradictions:

Kelly says that once he comes back out. . . he and Bascus have a conversation about the gun, give me the burner. He . . . fires a warning shot outside the building, outside the house, according to . . . Kelly and then, Bascus takes the gun and says, no let [us] do a better job and runs into the house, kicks open the door and . . . Bascus and Kelly go in and Bascus fires the gun.

Defendant's trial counsel, Thomas Cataldo, also testified regarding his trial strategy of misidentification. He explained, "I could [not] get around the fact that [defendant] was there at one point. My argument was that he was there earlier and was beaten up at the location, left, but never came back." Cataldo decided not to call Kelly to testify since he thought Kelly's testimony would undermine the defense strategy. Cataldo elaborated:

My defense. . . was that my client was – did not come back and shoot as alleged. It was two other people. And the problem with . . . Kelly was that he would have put the gun in my client's hands by saying that my client fired the gun as a, I guess as a warning, or he fired the gun in the air. That would have completely undermined my defense.

Cataldo noted Kelly was not an eyewitness to the shooting and could have been impeached on his prior record and pending charges. Additionally, Cataldo

testified to the logistics, cost, and challenge of transporting Kelly from where he was incarcerated in Pennsylvania to testify at the trial.

The judge did not give much weight to Cataldo's argument to extradite Kelly from Pennsylvania because of costs, finding the argument was contradicted by time, money and effort expended to retain the blood splatter expert flown from Florida and The Evidence Store to obtain measurements, photographs and produce "elaborate and expensive" trial exhibits.

The judge highlighted Cataldo's theory of the case was the misidentification of defendant. He explained at the time of trial, counsel attempted to argue defendant had been "beaten up" when he initially entered the house party, but did not return and, as such, he was not the shooter. For this reason, defendant was misidentified. The judge concluded Kelly's statement contradicted not only defendant's version of events but also defendant's theory of the case.

Detective Holt Walker, lead investigator in the case, testified at the hearing that he took Kelly's initial statement when he was in custody in Pennsylvania. Walker said Kelly's testimony was consistent that Bascus entered the house and shot the gun inside the party. Walker stated as part of his investigation, he walked the area outside of the house and there was no evidence

that suggested a warning shot had been fired from a gun. None of the witnesses, who were outside waiting to enter the party, heard a warning shot.

After reviewing the detailed testimony from the witnesses, the submissions and oral argument, the PCR judge issued an oral opinion on August 10, 2021, applying the Strickland³ and Fritz⁴ test, as well as State v. Arthur.⁵

The judge concluded:

This [c]ourt, having reviewed the materials submitted, as well as the testimony taken of the various witnesses and having passed upon the credibility of the various witnesses, it [is] in this [c]ourt's opinion that the proceeding would not have been different, that, in fact, . . . Mr. Cataldo's actions . . . fall within a wide range of reasonable professional assistance and therefore, would be considered trial, sound trial strategy and based upon that and the fact that Kelly wasn't called in this particular case, which would clearly undermine the defense's theory of the case, was within that trial strategy and therefore, the [c]ourt, pursuant to the Appellate Division's inquiry, would find that the actions of the defense counsel would not have changed the opinion, . . . not change the result in this particular case and therefore, fell within a reasonable professional assistance.

³ Strickland v. Washington, 466 U.S. 668 (1984).

⁴ State v. Fritz, 105 N.J. 42 (1987).

⁵ 184 N.J. 307 (2005).

On appeal, defendant raises a single issue for our consideration. Defendant contends reversal of his conviction is warranted based on ineffective assistance of counsel (IAC) for trial counsel's failure to call Kelly as an exculpatory witness.

II.

In State v. Pierre,⁶ our Supreme Court established the standard of review in PCR cases where the PCR court held an evidentiary hearing:

In reviewing a PCR court's factual findings based on live testimony, an appellate court applies a deferential standard; it "will uphold the PCR court's findings that are supported by sufficient credible evidence in the record." Indeed, "[a]n appellate court's reading of a cold record is a pale substitute for a trial judge's assessment of the credibility of a witness he has observed firsthand." However, a "PCR court's interpretation of the law" is afforded no deference, and is "reviewed de novo." "[F]or mixed questions of law and fact, [an appellate court] give[s] deference to the supported factual findings of the trial court, but review[s] de novo the lower court's application of any legal rules to such factual findings."

[Id. at 576-77 (citations omitted).]

A defendant must establish he is entitled to relief "by a preponderance of the evidence" in a PCR petition. State v. O'Donnell, 435 N.J. Super. 351, 370,

⁶ 223 N.J. 560 (2015).

(App. Div. 2014) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). To establish an IAC claim, a defendant must satisfy the two-part test under Strickland, 466 U.S. at 687, adopted by New Jersey in Fritz, 105 N.J. at 58.

The first prong of the Strickland test requires a defendant to establish counsel's performance was deficient. Preciose, 129 N.J. at 463. As to this prong, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[,] [and t]o rebut that strong presumption, a defendant must establish that trial counsel's actions did not equate to 'sound trial strategy.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 689). Further, because prejudice is not presumed, defendant must demonstrate how specific errors by counsel undermined the reliability of the proceeding. State v. Drisco, 355 N.J. Super 283, 289 (App. Div. 2002) (citing U.S. v. Cronic, 466 U.S. 648, 659 n.26 (1984)). "If counsel thoroughly investigates law and facts, considering all possible options, his or her trial strategy is 'virtually unchalleng[e]able.'" State v. Savage, 120 N.J. 594, 617 (1990) (quoting Strickland, 466 U.S. at 690-91).

"The second, and far more difficult, prong . . . is whether there exists 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Preciose, 129 N.J. at 463-64

(quoting Strickland, 466 U.S. at 694). Additionally, a defendant must prove he suffered prejudice due to counsel's deficient performance. Strickland, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Pierre, 223 N.J. at 583 (quoting Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52).

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Chew, 179 N.J. 186, 217 (2004) (alteration in original) (quoting Strickland, 466 U.S. at 691). "Determining which witnesses to call to the stand is one of the most difficult strategic decisions any trial attorney must confront." Arthur, 184 N.J. at 320. "[L]ike 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 321 (quoting Strickland, 466 U.S. at 693).

"Our standard of review is necessarily deferential to a PCR court's factual findings based on its review of live witness testimony. In such circumstances we will uphold the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013).

We review the PCR judge's findings of fact with great deference. Pierre, 223 N.J. at 576-77. This deference is particularly merited where the trial strategy being questioned is whether defense counsel should call a witness. Arthur, 184 N.J. at 321.

Here, the PCR judge found defendant failed to establish IAC. He considered the testimony of defendant, Kelly, Holt, and Cataldo. The judge explicitly determined Kelly was not credible and his testimony not only starkly contrasted defendant's version but was also inconsistent with defendant's theory of the case. Moreover, Kelly was subject to impeachment had he testified.

The judge's credibility determination regarding Kelly is of paramount importance, because if an IAC claim is premised on counsel's failure to call a witness, one important factor a judge must "consider . . . [is] the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses." State v. L.A., 433 N.J. Super. 1, 16-17 (App. Div. 2013) (quoting McCauley-Bey v. Delo, 97 F.3d 1104, 1106 (8th Cir. 1996)). Thus, we defer to the credibility determinations made by the judge based on his opportunity to see the witnesses. Nash, 212 N.J. at 540. Here, the judge concluded that Cataldo made a strategic decision not to call Kelly as a witness; and therefore, his

performance was not deficient. On this record, we see no reason to conclude otherwise.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION