SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2178-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAMSIDDI ABDUR-RAHEEM,
a/k/a SHAMSIDDI ABDUR,
SHAMSIDDIA ABDUR,
SHAMSIDDIA ABURRAHEEM,
SHAMSIDDI ABDURRAHEEM,
SHAMSIDDI RAHEE, SHAMSIDDIA
RAHEE, SHAMSIDDIN RAHEEM,[1]

Defendant-Appellant.

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Submitted May 2, 2023 – Decided June 23, 2023

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 10-08-0102.

[1] The indictment, defendant's pro se filings, and our prior opinion spell defendant's first name as Shamsiddin. The judgment of conviction, however, spells his name as Shamsiddi.

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

Matthew J. Platkin, Attorney General, attorney for respondent (Jennifer E. Kmieciak, Deputy Attorney General, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

A jury convicted defendant Shamsiddin Abdur-Raheem of the kidnapping and murder of his three-month-old daughter, the assault with a motor vehicle of the child's grandmother, L.B., and other related offenses. State v. Abdur-Raheem, No. A-2077-12 (App. Div. Jan. 24, 2017) (slip op. at 2). The evidence at trial is adequately set forth in our prior opinion, but we highlight some of the more salient facts.

Defendant and the child's mother, V.B., were estranged, and she and the child lived in East Orange with L.B. Id. at 5–6. After making more than one hundred calls to V.B.'s cellphone and being unable to contact her, defendant arrived unwanted and unexpected at L.B.'s apartment. Id. at 6. He surreptitiously entered, struggled with L.B., grabbed his daughter and fled, placing the child unrestrained in the back seat of his van. Id. at 7. L.B. followed

outside and stood in front of the vehicle, but defendant drove off, striking and carrying L.B. for a short distance before she fell off the van. Ibid.

The State produced eyewitness testimony that defendant stopped the van atop the Driscoll Bridge and pushed something that resembled a garbage bag off the side abutment before arriving alone in Atlantic City at the Masjid Mohammad mosque. Id. at 7–8. There, he made incriminating remarks to Imam Terrence Bethea, and later to his parents and police. Ibid.

The child's badly decomposed remains were not recovered on the marshy banks of the Raritan River until more than two months later. Id. at 8–9. The medical examiner, Dr. Lyla E. Perez, confirmed the child suffered multiple injuries to the head and skull consistent with a fall from the bridge to the river, and she concluded the cause of death was "drowning and blunt force trauma to the head." Id. at 9. A forensic anthropologist, Gina O. Hart, opined the child's head injuries that occurred "at or around the time of death," were consistent with "a fall from a significant height" and were not likely caused by a fall off a bed or "while [the] child was being carried by someone." Id. at 9–10. While in custody awaiting trial, defendant sent V.B. an incriminating letter that was read to the jury. Id. at 10.

Defendant testified at trial and claimed that during the struggle in the East Orange apartment, L.B. either fell on top of the child or dropped her, causing the baby's head to hit the floor. Ibid. After he put the child in his van and as he drove south along the Garden State Parkway, defendant turned to check on her in the back seat and saw her eyes were "wide open," she was not moving and, according to defendant, "was obviously dead.'" Id. at 11. He admitted that he "'tossed [his] daughter off the bridge,'" but could not explain why. Ibid.

Following the jury's guilty verdicts, the judge imposed an aggregate sentence of life imprisonment, plus thirty-one years. Id. at 2. We affirmed defendant's conviction and the sentence imposed on direct appeal. Id. at 5. The Court subsequently denied defendant's petition for certification. State v. Abdur-Raheem, 232 N.J. 52 (2017).

Defendant filed a timely pro se petition for post-conviction (PCR) relief. Multiple attorneys were assigned to represent defendant, in part because of defendant's dissatisfaction with their efforts, and all filed briefs in support of the petition. Defendant also filed pro se supplemental briefs.

The PCR judge, who was not the trial judge, heard argument. Supported by a thirty-two-page written opinion, the judge's December 11, 2020 order denied defendant's petition. He now appeals alleging eleven specific errors

committed by trial counsel that rendered his assistance ineffective (IAC). Defendant's counseled brief also argues that the PCR judge failed to address the arguments defendant raised in his pro se filings.

In his pro se supplemental appellate brief, defendant asserts specific claims of trial counsel's ineffective assistance, some of which repeat those made by counsel, and he also claims that appellate counsel rendered ineffective assistance and the prosecutor committed a Brady[2] violation by failing to turn over exculpatory evidence at trial.

We have considered these arguments in light of the record and applicable legal standards. We order a limited remand for an evidentiary hearing on one of defendant's claims and otherwise affirm the judge's order denying defendant's PCR petition.

I.

To succeed on an IAC claim, a defendant must meet the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and applied by our Court in State v. Fritz, 105 N.J. 42, 58 (1987). First, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Fritz, 105 N.J. at 52

[2] Brady v. Maryland, 373 U.S. 83 (1963).

(quoting Strickland, 466 U.S. at 687). "To satisfy prong one, [a defendant] ha[s] to 'overcome a "strong presumption" that counsel exercised "reasonable professional judgment" and "sound trial strategy" in fulfilling his responsibilities.'" State v. Nash, 212 N.J. 518, 542 (2013) (quoting State v. Hess, 207 N.J. 123, 147 (2011)). "[I]f counsel makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is 'virtually unchallengeable.'" Ibid. (alteration in original) (quoting State v. Chew, 179 N.J. 186, 217 (2004)).

Second, a defendant must show 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).

Our rules anticipate the need to hold an evidentiary hearing on a PCR petition, "only upon the establishment of a prima facie case in support of post-conviction relief." R. 3:22-10(b). "A prima facie case is established when a defendant demonstrates '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.'" State v. Porter, 216 N.J. 343, 355 (2013) (quoting R.

3:22-10(b)). We review the PCR court's decision to grant or deny a defendant's request for an evidentiary hearing under an abuse of discretion standard. State v. L.G.-M., 462 N.J. Super. 357, 365 (App. Div. 2020) (citing State v. Russo, 333 N.J. Super. 119, 140 (App. Div. 2000)).

"[W]e review de novo the PCR court's conclusions of law." Ibid. (citing Nash, 212 N.J. at 541). Where, as here, the court does not hold an evidentiary hearing on a PCR petition, we may review de novo the factual inferences the trial judge drew from the documentary record. Id. at 361 (citing State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014)). With these guideposts in mind, we address defendant's IAC claims against trial counsel.

II.

In both his counseled and pro se appellate briefs, defendant argues trial counsel provided ineffective assistance because he failed to call an expert witness to rebut the State's experts regarding a critical point of his defense, i.e., whether his daughter was already dead when defendant pushed her body off the Driscoll Bridge. Prior to trial, defendant retained Dr. Mark L. Taff, a forensic pathologist. Although both the State's and defendant's appellate briefs aver that defense counsel received Dr. Taff's report before trial, referencing the report

contained in the appendix, that report is addressed to one of defendant's PCR counsel and dated September 24, 2019, years after trial.

The parties apparently concede, and the PCR judge accepted, that had Dr. Taff been called as a witness at trial, he would have offered the opinions contained in the exhibit in the appendix. Among other things, Dr. Taff opined Dr. Perez's conclusion that the cause of death was "antemortem" — before death — "asphyxia due to drowning and blunt force impact of the head" could not have been properly made given the advanced stage of decomposition of the body. Dr. Taff stated the cause of death should have been listed as "undetermined in decomposed body."

The record at trial contains snippets of defense counsel's fruitless attempts to produce Dr. Taff during the trial. At one point, immediately before Dr. Perez testified, the judge's law clerk assisted by calling the doctor's office, but his staff could not locate him. There was indication that defense counsel would attempt again the following morning, however, after the medical examiner, who was the State's final witness, completed her testimony, defense counsel said, "I don't think we'll use Dr. Taf[f]." Counsel asked the judge to "mention to [his] staff if Dr. Taf[f] finally decides to respond let him know his assistance is no longer required. I appreciate the [c]ourt's assistance." The judge dismissed the jury

for the day and conducted a partial charge conference. There was no further mention of Dr. Taff the next morning when defendant testified as the sole defense witness.

The PCR judge concluded defendant failed to demonstrate prejudice resulting from "trial counsel's strategy not to call an expert witness. [He] merely presents an alternate trial strategy." The judge cited trial counsel's "effective cross-examination of the State's expert regarding the cause/timing of death as being consistent with the defense position that the child was dead before the bridge," something defendant "could have proven with his own expert."

The judge discounted defendant's argument "that the record makes it clear . . . the proposed defense expert . . . was not called . . . because" he could not be found in time. On this point, the judge reasoned defendant failed to demonstrate any prejudice because "cross-examination of the State's witness resulted in achieving the goal of having the expert opine consistent with the defense theory of the case. . . . [T]rial counsel got the State's expert to admit that certain injuries were caused before the bridge and that the child could have died before the bridge." The judge deemed this "admission" by the State's expert "could make [it] more powerful in [defendant's] favor." We disagree and conclude a remand for an evidentiary hearing on this IAC claim is necessary.

We acknowledge that deciding which witnesses to call at trial is "one of the most difficult strategic decisions that any trial attorney must confront." State v. Arthur, 184 N.J. 307, 320 (2005). "[A] court's review of such a decision should be 'highly deferential.'" Id. at 321 (quoting Strickland, 466 U.S. at 693). Indeed, "[d]ecisions as to trial strategy or tactics are virtually unassailable on [IAC] grounds." State v. Cooper, 410 N.J. Super. 43, 57 (App. Div. 2009) (citing Strickland, 466 U.S. at 690–91). Whether trial counsel made a strategic decision not to call Dr. Taff, however, is less than clear from the record.

As noted, there are references to counsel's attempts to locate and produce Dr. Taff prior to the medical examiner's testimony, perhaps in an effort to have him present during that testimony. And some indication that counsel would continue those attempts the next day. However, the medical examiner was the State's final witness, and the defense was scheduled to begin immediately thereafter. There are also indications in the record that the State's case moved along more quickly than anticipated.[3] For these reasons, we reject the State's contention that trial counsel's statement — "I don't think we'll use Dr. Taf[f]" — reflects a clear, unambiguous and unburdened exercise of trial strategy.

[3] At one point, trial counsel objected to the prosecutor's remark before the jury that the next witness was unavailable because he did not anticipate defense counsel would not cross-examine V.B., the baby's mother.

We also reject the PCR judge's conclusion, reiterated before us by the State, that defendant suffered no prejudice because trial counsel essentially achieved through cross-examination of Dr. Perez qualitatively equivalent evidence. We start by recognizing that this analysis somewhat conflates two related, but separate, rights bestowed on a criminal defendant by the Sixth Amendment. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." State v. Fort, 101 N.J. 123, 128 (1985) (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

Trial counsel's cross-examination of Dr. Perez was short, lasting only two-and-one-half pages of transcript, but effective. Dr. Perez acknowledged that she could not perform many of the tests she otherwise would have performed to "establish drowning." She also acknowledged her reliance on "the history that's given . . . about what occurred," and in this case, she was "led to believe that someone dropped a living baby off a bridge." (Emphasis added).

Dr. Taff's report, however, said much more. While agreeing that the cause of death was homicide, he said it could not "be anatomically proven that [the child] was alive when she entered the river and subsequently drowned," and it

was "unknown if [the child's] skull fractures were sustained before or after the kidnapping . . . ." He said the amount of force that caused the skull fractures, whether from "a low and/or high-level fall or river related activity" could not be established.

From the cold record before us, and "viewing the facts alleged in the light most favorable to the defendant" as we must, see Rule 3:22-10(b), we conclude the judge mistakenly exercised her discretion by not conducting an evidentiary hearing on this limited aspect of defendant's IAC claims. We cannot tell whether the decision not to call Dr. Taff as a witness was a reasonable strategic choice by trial counsel, or the doctor's absence was an unintended, unexpected event reflective of deficient performance. Nor can we determine without the doctor's testimony whether his absence and the jury's inability to consider his expert testimony could have reasonably affected the outcome. Fritz, 105 N.J. at 58.

III.

In all other respects, we affirm the PCR judge's order denying defendant's petition, finding several of the points raised on appeal lacking sufficient merit to warrant extensive discussion in a written opinion. R. 2:11-3(e)(2). We deal in more detail with some of them.

A.

Defendant claims trial counsel was ineffective in presenting his "mistake of fact" defense and in failing to object to the lack of a jury charge on this issue. In his pro se brief, defendant claims appellate counsel was ineffective for failing to raise the issue on direct appeal. We disagree with the State's assertion that the issues were previously addressed and therefore procedurally barred. R. 3:22-5. We specifically preserved defendant's IAC claims in our prior opinion. See Abdur-Raheem, slip op. at 27 ("To the extent defendant raises arguments of trial counsel's ineffective assistance in his pro se submission, they are preserved pending a request for post-conviction relief." (citing State v. Preciose, 129 N.J. 451, 460 (1992))); see also State v. Allen, 398 N.J. Super. 247, 257 n.8 (App. Div. 2008) (recognizing the difference in some cases between issues "framed on the direct appeal and as presented now in the context of [IAC]").

As noted, the import of defendant's testimony was that he believed the baby was already dead when he threw her off the bridge. Trial counsel requested the judge charge the jury that defendant could not be found guilty if he mistakenly believed the baby was already dead. See Model Jury Charges (Criminal), "Ignorance or Mistake (N.J.S.A. 2C:2-4)" (approved May 7, 2007). The prosecutor objected, arguing that defendant's testimony was unequivocal,

i.e., he believed his daughter was dead when he threw her off the bridge. The judge denied defendant's request, which we agree was appropriate based on the trial evidence.

But the judge agreed to tell the jurors in the context of the charge on purposeful and knowing murder that "if in fact there was a belief on [defendant's] part that the infant had already died[,] obviously it would not be a knowing purposeful murder under that situation." The judge omitted any such reference during his final instructions, and trial counsel did not object.

Defendant's PCR certification claimed that he wanted to tell the jury he may have been mistaken about the child's condition, but counsel adamantly told him not to say that before the jury. Defendant's assertion is unsupported by anything in this record and conveniently seeks to supply the deficiency in the evidence noted by the prosecutor at trial when he properly objected to the requested charge. More importantly, assuming trial counsel refused defendant's specific request to ask him before the jury if he might have been mistaken about whether the child was dead, counsel clearly made a wise strategic decision not to do so. Trial counsel was not deficient for failing to have defendant equivocate about the essential premise of his defense only for the purpose of establishing grounds for providing the model jury charge.

However, we are more concerned with the judge's failure to give the charge he proposed that sufficiently explained how defendant's belief that his daughter was already dead affected issues of causation and defendant's mental state, and counsel's failure to object when the judge failed to do so. Even if counsel's performance was deficient in this regard, we conclude any failure by the judge to provide the supplemental instructions he proposed does not undermine our confidence in the jury's verdict.

Plain error, in the context of a jury charge, is "[l]egal impropriety . . . prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Camacho, 218 N.J. 533, 554 (2014) (alteration in original) (quoting State v. Adams, 194 N.J. 186, 207 (2008)). "[A]ny alleged error also must be evaluated in light 'of the overall strength of the State's case.'" State v. Burns, 192 N.J. 312, 341 (2007) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)).

Here, the State's case was strong. Although the jury needed to decide the critical issue of whether defendant purposefully or knowing caused his daughter's death, there was other substantial evidence, including defendant's own statements, that circumstantially demonstrated he did. In addition, the

judge's charge made it clear that the State needed to prove beyond a reasonable doubt that defendant did act purposefully or knowingly, and that his action legally caused the child's death. If the jurors followed those instructions, and we presume they did, see State v. Ross, 229 N.J. 389, 414–15 (2017), they would have clearly understood the State's burden to disprove defendant's belief, mistaken or otherwise, that his daughter was already dead when he threw her body into the Raritan River.

We apply the same standard to defendant's claims of ineffective assistance of appellate counsel that we do to claims of ineffective assistance of trial 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)). Because we think there was no plain error compelling reversal for failure to provide additional instructions to the jury, appellate counsel was not deficient for failing to raise the issue on direct appeal. State v. Echols, 199 N.J. 344, 361 (2009).

B.

Defendant moved pre-trial to suppress his statements to Imam Bethea based on N.J.R.E. 511, the so-called cleric-penitent privilege. The record reflects some confusion as to whether Imam Bethea was coming to testify and whether he was under subpoena. Trial counsel then asked the court to go off the

record so he could speak with defendant.[4] Back on the record, the following exchange occurred:

> Defense counsel: Your Honor, we [are] prepared to proceed.
>
> The court: You are prepared to proceed. The Court wants to ask some questions.
>
> Defense counsel: Fine.
>
> The court: To put it another way, you are not asking that [Imam Bethea] be present, for the purposes of placing him on the stand?
>
> Defense counsel: I consulted with my client, and that is his decision, yes.

"[T]he judge made his ruling based upon proffers" and denied defendant's motion to suppress the statements defendant made to the imam. Abdur-Raheem, slip op. at 17–18. We affirmed that ruling on direct appeal. Id. at 19–20. Imam Bethea was a State's witness at trial, and trial counsel asked no questions on cross-examination.[5]

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[4] At the time of the hearing, defendant was represented by another attorney, not the attorney who tried the case before the jury.

[5] As we noted, Imam Bethea testified and never asserted the privilege, even though he could have pursuant to N.J.R.E. 511. Id. at 17 n.6.

In his counseled brief, defendant contends trial counsel was ineffective because he failed to call Imam Bethea as a witness at the pre-trial hearing. In his pro se brief, defendant contends an evidentiary hearing is necessary because defendant never elected to waive the Imam's presence as a witness at the pre-trial hearing. Nothing in the record supports defendant's bald assertion that he did not wish to proceed without Imam Bethea's presence at the hearing. Moreover, assuming Imam Bethea would have testified at the pre-trial hearing as he did at trial, and we have no reason to think otherwise, defendant's statement would not have been suppressed and would have been admitted, as it was, at trial. Again, defendant suffered no prejudice even if counsel's performance was deficient and contrary to defendant's alleged preference to have the imam testify at the pre-trial hearing. Echols, 199 N.J. at 361.

C.

In his counseled and pro se brief, defendant argues trial counsel was ineffective because he bolstered anthropologist Hart's testimony that the baby's skull fractures occurred at or around the time of death and were most likely the result of a fall from a significant height. In summation, counsel argued that Hart's testimony supported defendant's claim that the baby was dead before being thrown from the bridge. In rejecting this contention, the PCR judge wrote

counsel's argument was that "Hart's conclusion made it possible that . . . defendant's testimony about the events could be true. . . . An evidentiary hearing is not needed to ascertain why trial counsel pursued this strategy as it is clear on its face that it was used to support [defendant's] testimony." We agree.

The same is true of the IAC argument raised both in defendant's counseled and pro se briefs regarding the decision not to cross-examine L.B., particularly about inconsistencies between her prior statements to police and her trial testimony. In his summation, trial counsel repeatedly pointed the jury's attention to L.B.'s hospital records, which were in evidence and contained her version of defendant's actions, and the minimal injuries L.B. suffered. In her written opinion, the PCR judge accurately noted "the discrepancies" in the police statements were "relatively immaterial, were in part included by defense counsel in summation, and are not clearly capable of skewing the resultant verdict. . . . Trial strategy decisions are afforded great deference." See, e.g., State v. Hightower, 120 N.J. 378, 432 (1990) ("Which witnesses to cross-examine and the nature of the questions asked fall within this broad zone of attorney discretion."). We agree.

D.

The remaining IAC claims lack sufficient merit to warrant extensive discussion in a written opinion. R. 2:11-3(e)(2).

Defendant contends trial counsel failed to obtain the notes of law enforcement witnesses, and in his pro se submission, asserts a concomitant claim this was a Brady violation. It suffices to say that trial counsel probed whether such notes existed and asked for their production if they did, and any claim that such notes would have produced impeachment or exculpatory evidence is rank speculation. Furthermore, nothing in the record justifies PCR discovery under the holding in State v. Szemple, 247 N.J. 82 (2021).

In his counseled brief, defendant argues trial counsel was ineffective for not objecting to the prosecutor's cross-examination about defendant's "silence," and in both his counseled and pro se briefs, defendant contends that counsel failed to request a specific jury instruction limiting the use of such evidence. In fact, as the PCR judge found, trial counsel did object, and the judge overruled the objection. We affirmed that decision on direct appeal. Abdur-Raheem, slip op. at 23. Additionally, defendant raised the lack of a limiting instruction on direct appeal, id. at 5, and we specifically rejected the argument, id. at 27. See R. 3:22-5 (recognizing procedural bar to claims previously adjudicated).

The State played a redacted portion of a phone conversation between V.B. and defendant while he was in custody. In it, V.B. accused defendant of killing their daughter. Defendant asserted on PCR that trial counsel was ineffective, because he did not object to the omission of defendant's answer to the accusation — an alleged denial — nor did trial counsel object to the prosecutor's use of the truncated statement during summation.

Initially, the PCR judge found the transcript of the call reflects that defendant did not deny the accusation and playing the entire call could have been more prejudicial to defendant. Moreover, defendant testified and denied killing his daughter; therefore, defendant suffered no prejudice. We agree, and only add that the transcript of the call in the appellate record does not include a denial by defendant to V.B.'s accusation.

Finally, defendant's IAC claims based on counsel's failure to seek the judge's recusal, his alleged delivery of an inadequate summation, his failure to request a curative charge because of the prosecutor's remarks during summation, and the remaining claims in defendant's counseled and pro se briefs lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We also find no reason to remand for the PCR judge to address the few claims defendant made in his pro se submissions in the Law Division that she failed to

specifically address; they, too, lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION