

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3077-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.V.P., JR.,¹

Defendant-Appellant.

Argued April 18, 2023 – Decided August 29, 2023

Before Judges Messano and Perez Friscia.

On appeal from the Superior Court of New Jersey,
Law Division, Burlington County, Indictment No. 13-
02-0208.

Steven E. Braun argued the cause for appellant.

Nicole Handy, Assistant Prosecutor, argued the cause
for respondent (LaChia L. Bradshaw, Burlington

¹ As in our prior opinion, we use initials pursuant to Rule 1:38-3(c)(9) to maintain the confidentiality of "child victims of sexual assault or abuse." (citing N.J.S.A. 2A:82-46).

County Prosecutor, attorney; Nicole Handy, of counsel and on the brief).

PER CURIAM

A jury convicted defendant J.V.P., Jr. "of eight counts of third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a); seven counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a); three counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a); and one count of fourth-degree attempted criminal sexual contact, N.J.S.A. 2C:5-1 and 2C:14-3(b)." State v. J.V.P., No. A-4862-14 (App. Div. Jan. 9, 2017) (slip op. at 1–2). The trial judge imposed a ten-year term of imprisonment subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. Id. at 2. We affirmed defendant's conviction on direct appeal, ibid., and the Court denied his petition for certification. 230 N.J. 500 (2017).

Defendant filed a timely petition for post-conviction relief (PCR) alleging fourteen claims of ineffective assistance by trial and appellate counsel (IAC) and, in an amended petition, defendant asserted another IAC claim against trial counsel. Although the appellate record does not include a transcript of the first argument held on the petition, apparently the PCR judge, who was not the trial judge, ordered an evidentiary hearing, which took place

on March 1, 2021. Trial counsel, defendant's appellate counsel, and defendant testified at the hearing.

The PCR judge filed a written opinion in which he addressed defendant's myriad claims. He found the testimony of both trial and appellate counsel to be credible and concluded defendant "failed to present competent facts sufficient to demonstrate his trial or appellate counsel's alleged . . . failure to meet the required standard of professional conduct, or prejudice suffered [by defendant] as a result." The PCR judge denied the petition, and this appeal followed.

I.

Trial Evidence

We briefly summarize salient evidence the State adduced at trial, relying both on our prior unpublished opinion and trial transcripts.

When defendant's conduct was first brought to the attention of law enforcement in July 2012, S.K. was fifteen-years old and A.K. was seventeen-years old. J.V.P., slip op. at 2. S.K. told her mother, defendant's daughter J.S., that defendant had sexually touched her on the balcony of the family church during Sunday services on July 8, and, when J.S. confronted defendant, he admitted this had occurred. Id. at 3. Defendant told his daughter that he

intended to speak with his pastor, who was also chaplain for the local police department. Ibid.

J.S. took her daughter to the Burlington County Prosecutor's Office on July 12, where K.S. provided a detailed statement including allegations of defendant's prior abuse in September and November 2011. Ibid. Further investigation revealed defendant had abused A.K. prior to 2011. Ibid. Both S.K. and A.K. testified at trial.

Before trial, the judge conducted a N.J.R.E. 104(c) hearing "to determine two issues: whether defendant's statements to his pastor were privileged; and whether defendant was properly advised of his Miranda^[2] rights and knowingly and voluntarily waived those rights prior to providing his statement to investigators." Ibid. The trial judge heard from: Pastor Guy Glass; Welton Chase, a member of defendant's church; defendant; and his wife. The State produced J.S.; Detective Brian Miller; and Jeremy Vrablic, another church member.

Trial counsel, who had successfully moved to permit defendant to withdraw a previously entered guilty plea, explained to the judge that defendant's prior counsel had also moved to dismiss the indictment based on

² Miranda v. Arizona, 384 U.S. 436 (1966).

the State's use of "tainted evidence" flowing from the breach of privileged information defendant shared with Pastor Glass. Counsel's motion brief specifically argued that a subsequent statement defendant gave to police was "tainted" by violation of the privilege. As we summarized,

The evidence at the hearing revealed that on July 11, 2012, after being confronted by his daughter about S.K.'s allegations and admitting they were true, defendant went to church and told his pastor that he had inappropriately touched S.K. during Sunday services. The pastor then spoke with defendant and his wife, who had no prior knowledge of the incident. The pastor contacted the local police chief and told him of defendant's admissions.

The following day, J.S. brought S.K. to the Prosecutor's Office, where she agreed to participate in a consensual intercept of text messages between herself and defendant in which defendant admitted touching S.K.'s breasts and vagina. Later, during the evening of July 12, police arrived at defendant's home and asked to speak to him at the police station. He agreed and was driven to the station by his wife. Defendant also called his pastor and asked him to come to the station for support, and he did. Defendant and his wife testified the pastor told defendant to cooperate fully. However, the pastor testified that defendant was already being interrogated when he arrived at the station.

Detectives administered Miranda rights to defendant and he indicated his understanding. They then asked if he was "comfortable speaking with [them] . . . ?" Although he immediately answered in the affirmative, defendant then said he was "not

comfortable, but [he had] to." The following exchange occurred:

A: It's uncomfortable because of what's goin [sic] on, but I, it's comfortable. I have to.

Q: Okay. Well, keeping your [r]ights in mind, you don't[] . . [.]

A: I'm not talking about my [r]ights. I'm just talking about, I, it's the uncomfortability [sic] of knowing what's gotta [sic] happen.

Q: Okay. Well, like I said, you're free to go. You don't have to stay here and all that at this moment . . .

A: No sir. I know I . . .

Q: keeping your [r]ights, you know.

A: I have to stay here.

Q: Okay. Well, that's under your own will and volition. You can[] . . [.]

A: Yes.

Q: go.

Defendant subsequently executed a waiver of rights form and provided a statement that comprise[d] more than [100] transcribed pages in which he admitted sexually abusing both granddaughters.

[Id. at 4–5 (all except the fifth, tenth and twelfth alterations in original).]

The trial judge concluded defendant's statements to his pastor were privileged under N.J.R.E. 511 but also determined his statement to law enforcement was admissible. Id. at 5–6.

J.S. testified at trial regarding her daughter's disclosure and her confrontation with defendant. S.K.'s friend Tristen Strunk also testified. He had learned of defendant's sexual conduct from a text message S.K. sent to him. Vrablic learned about defendant's conduct from Strunk's mother, who was Vrablic's sister, and he spoke directly with S.K. about it. Thereafter, Vrablic spoke with J.S. who, by this time, was preparing to go to the Prosecutor's Office. Vrablic also spoke with defendant who made certain admissions to him.

After Detective Miller took S.K.'s formal statement and while she was still at the Prosecutor's Offices with her parents, J.S. engaged in a text message conversation with defendant that was consensually intercepted by investigators. In that exchange, defendant admitted sexually touching S.K. but denied that he had penetrated her vagina.

At that point, detectives went to defendant's home and indicated they wished to speak with him. Defendant agreed to drive to the Pemberton

Township Police Department headquarters, where he arrived with his wife and Pastor Glass. The recorded statement, containing defendant's admissions of sexual offenses involving both of his granddaughters, was played for the jury. Dr. Stephanie Lanese, a board-certified child abuse pediatrician, was the State's final witness and testified about her August 2012 examination of S.K. Dr. Lanese found no physical evidence of sexual abuse.

Defendant elected not to testify, but his wife did. She rebutted certain details of S.K.'s testimony. A pastor from another church testified to defendant's good character and truthfulness.

The PCR Judge's Opinion Following the Evidentiary Hearing

We briefly summarize the testimony of trial and appellate counsel at the evidentiary hearing. Trial counsel was a certified criminal trial attorney who had practiced for thirty years and agreed to represent defendant after reviewing a transcript of his guilty plea allocution. Defendant had pled guilty to first-degree aggravated sexual assault but was adamant that he had not sexually penetrated either S.K. or A.K. Counsel's review of the transcript led him to conclude defendant had not "fully allocuted to the elements of the crime." The motion to withdraw defendant's guilty plea was successful.

Counsel specifically testified that he discussed a strategy with defendant that sought to avoid a first-degree conviction. He testified that "we weren't offering a defense" to the sexual contact charges, given defendant's multiple admissions. Counsel contemplated making a motion to strike certain counts of the indictment because they lacked "specificities as to date and location" but concluded its success was unlikely. Counsel never considered filing a severance motion because he did not believe it would have been successful.

Counsel also testified that his motion to exclude defendant's statements to Pastor Glass included an argument that the pastor was "a de facto agent of the State and encouraged [defendant] to wave his Fifth Amendment [r]ights and make a statement to the police." However, the trial judge rejected the argument.

Appellate counsel had been licensed since 1980 and primarily did criminal work in South Jersey. Given the "quantum of evidence, and specifically the number of witnesses who overheard [defendant] mak[e] admissions about his conduct," she did not believe arguing defendant's statement to police was the "fruit of the poisonous tree" would be effective. Appellate counsel explained why she did not raise other issues on direct appeal, concluding they lacked merit. She also testified to a specific

conversation she had with defendant explaining that trial counsel had done an effective job in exposing the inconsistencies in S.K.'s and A.K.'s testimony.

Defendant's testimony on direct examination was brief, essentially only acknowledging PCR counsel's suggestion that although detectives read him his Miranda rights, there was no "discussion . . . regarding [defendant's] right to refuse to provide a statement[.]" On cross-examination, defendant admitted, however, that Detective Miller had advised him of his right to remain silent.

In his written decision denying defendant's petition, the judge addressed all the IAC arguments defendant now raises on appeal. We discuss the judge's reasoning below.

Issues raised on appeal

Before us, defendant argues that trial counsel was ineffective because he failed to: (1) move to sever the charges involving S.K. from those involving A.K.; (2) request a bill of particulars regarding the dates of the offenses charged in the indictment; (3) move for a mistrial "when repeated instances of uncharged misconduct" were introduced before the jury, and appellate counsel was ineffective for failing to raise the issue on direct appeal; (4) argue statements defendant made to his minister tainted other evidence that should have been excluded as "fruit of the poisonous tree," and appellate counsel was

ineffective for failing to raise the issue; (5) request jury instructions on lesser-included offenses, and appellate counsel was ineffective for failing to raise the issue; (6) object and move for a mistrial because of prosecutorial misconduct, and appellate counsel was ineffective for failing to raise the issue; (7) adequately cross-examine S.K. by not confronting her with Dr. Lanese's report that indicated she found no signs of penetration; and (8) argue defendant's use of the term "excitement spot" in his statement to police did not mean he penetrated the victim's vagina. Defendant also contends trial counsel was ineffective for conceding defendant's guilt as to some counts of the indictment.

Defendant further argues the trial judge's conclusion that evidence of the offenses would have been inevitably or independently discovered by the State regardless of defendant's privileged admissions to Pastor Glass, thereby rejecting any "fruit of the poisonous tree" analysis, resulted in a "substantial denial of his rights" cognizable on PCR. Defendant also argues "new" authority from our Supreme Court, specifically its decision on State v. Tillery, 238 N.J. 293 (2019), makes his challenge to the statement he gave police cognizable on PCR. Lastly, defendant claims he is entitled to PCR based on the cumulative effect of trial and appellate counsel's ineffective assistance.

We reject these contentions and affirm.

II.

Well-known standards guide our review of defendant's IAC arguments. To succeed on an IAC claim, a defendant must satisfy both prongs of the test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and applied by our Court to similar claims brought under the New Jersey Constitution in State v. Fritz, 105 N.J. 42, 58 (1987). "The Strickland/Fritz test [also] governs claims that appellate counsel rendered ineffective assistance." State v. Harris, 181 N.J. 391, 518 (2004) (citing State v. Morrison, 215 N.J. Super. 540, 546 (App. Div. 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 (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)).

Second, a defendant must show a "reasonable probability" that the deficient performance affected the outcome. Fritz, 105 N.J. at 52 (citing Strickland, 466 U.S. at 694). "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). "That 'is an exacting standard.'" State v. Gideon, 244 N.J. 538, 551 (2021) (quoting State v. Allegro, 193 N.J. 352, 367 (2008)). "Important to the prejudice analysis is the strength of the evidence that was before that fact-finder at trial." Pierre, 223 N.J. at 583.

When the judge conducts an evidentiary hearing, "we will defer to the PCR court's factual findings, given its opportunity to hear live witness testimony, and 'we will uphold the PCR court's findings that are supported by sufficient credible evidence in the record.'" Gideon, 244 N.J. at 551 (quoting Nash, 212 N.J. at 540). "But, we review de novo the PCR court's conclusions of law." State v. L.G.-M., 462 N.J. Super. 357, 365 (App. Div. 2020) (citing Nash, 212 N.J. at 541). We apply these standards now in considering the IAC claims defendant raises on appeal.

A.

The PCR judge rejected defendant's claim that trial counsel was ineffective for failing to move for a severance of the charges as to each victim. He found the argument "speculative," noted separate trials would have more likely led to consecutive sentences, and "the outcome of [the] trial would not

have been different if the severance was granted." We agree that trial counsel did not render ineffective assistance by not seeking a severance, but we do so for reasons other than those expressed by the judge. See, State v. Scott, 229 N.J. 469, 479 (2017) ("It is a long-standing principle underlying appellate review that 'appeals are taken from orders and judgments and not from opinions . . . or reasons given for the ultimate conclusion.'" (quoting Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001))).

We fully discussed a similar issue in State v. Smith, a decision issued after the PCR hearing and decision in this case, and which defendant brings to our attention pursuant to Rule 2:6-11(d)(1). 471 N.J. Super. 548 (App. Div. 2022). We need not repeat the standards which would have been applied to deciding a severance motion if one had been brought in this case. Id. at 567–68. Unlike the defendant in Smith, who denied any sexual misconduct with his daughter and stepdaughter, id. at 569, defendant here admitted having committed some of the offenses to multiple people on multiple occasions. Moreover, as the trial evidence demonstrated and unlike the facts in Smith, despite these admissions, defendant's "motive, opportunity, [and] intent," as well as the lack of any "mistake or accident" with at least some incidents of his

sexual contact with his granddaughters, see N.J.R.E. 404(b), were contested issues at trial.

In short, had trial counsel made a motion to sever the charges involving S.K. from those involving A.K., it most likely would have been denied. "The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel." State v. Worlock, 117 N.J. 596, 625 (1990).

B.

The PCR judge concluded trial counsel was not ineffective for failing to move for a bill of particulars pursuant to Rule 3:7-5. Citing State in the Interest of K.A.W., 104 N.J. 112 (1986), the judge wrote, "[T]he timeframe of the allegations provided fair notice" to defendant of the allegations made by K.W. and A.W., and defendant "had ample time and information to form his defense." We agree.

"An indictment must adequately identify and explain the criminal offense to enable the accused to prepare a defense." State v. Wein, 80 N.J. 491, 497 (1979) (citing State v. Boratto, 80 N.J. 506 (1979)).

[I]t has traditionally been the rule that "time and place have been viewed as not requiring great specificity," as they typically are not elements of the crime; "[t]hus, the time allegation can refer to the event as having occurred 'on or about' a certain date and, within reasonable limits, proof of a date before or

after that specified will be sufficient, provided it is within the statute of limitations."

[State v. Jeannotte-Rodriguez, 469 N.J. Super. 69, 103–04 (App. Div. 2021) (second alteration in original) (quoting 5 Wayne R. LaFave et al., Criminal Procedure, § 19.3(c) (4th ed. 2020)).]

In assessing whether a defendant has received sufficient notice in cases involving allegations of sexual abuse against minor victims, the Court has instructed trial courts to consider

the length of the alleged period of time in relation to the number of individual criminal acts alleged; the passage of time between the alleged period for the crime and defendant's arrest; the duration between the date of the indictment and the alleged offense; and the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

[State v. Salter, 425 N.J. Super. 504, 514–15 (App. Div. 2012) (quoting K.A.W., 104 N.J. at 122).]

In this case, the vast majority of counts in the indictment alleged crimes had been committed within specific thirty- or sixty-day periods. The crimes committed against A.K. were alleged to have occurred at the earliest in May 2009, and those against S.K., in October 2010. Defendant was arrested in July 2012. We recognize that had a motion for a bill of particulars been made, the judge could have inquired about "the extent and thoroughness of the

prosecutor's investigative efforts to narrow the time frame of the alleged offense[s]." K.A.W., 104 N.J. at 122.

However, even a successful motion for a bill of particulars would not have resulted in dismissal of the indictment. See, e.g., State v. C.H., 264 N.J. Super. 112, 125 (App. Div. 1993) (recognizing that "strict application" of a rule requiring specific dates juvenile victim was sexually abused "would inhibit prosecution of child molesters" (citing K.A.W., 104 N.J. at 119)). More importantly, defendant admitted to some of the alleged crimes in his statement to police. Nothing in the record demonstrates defendant's ability to prepare a defense was inhibited or that he otherwise suffered prejudice by counsel's failure to bring a motion for a bill of particulars.

C.

Defendant argues that trial counsel was ineffective for failing to object and move for a mistrial "when repeated instances of uncharged misconduct" by defendant were presented to the jury. He contends that A.K. was permitted to say defendant had molested her "hundreds of times," and S.K. testified about a specific incident not charged in the indictment. Defendant also asserts that appellate counsel was ineffective for failing to raise the issue on appeal.

The PCR judge rejected the argument. The judge credited trial counsel's explanation of his strategy, specifically to use the claims of "hundreds" of incidents of abuse that were never disclosed, to impair A.K.'s credibility. The judge also found that some of the testimony was relevant and admissible to crimes charged in the indictment.

The PCR judge made no findings regarding appellate counsel. Counsel testified at the PCR hearing that she did not raise the argument on appeal because she believed most or all of the testimony would have been admitted under the doctrine of *res gestae*, and any argument raised on appeal would have been unsuccessful.

"[I]f counsel makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is 'virtually unchallengeable.'" Nash, 212 N.J. at 542 (alteration in original) (quoting State v. Chew, 179 N.J. 186, 217 (2004)). "Mere dissatisfaction with a 'counsel's exercise of judgment' is insufficient to warrant overturning a conviction." Ibid. (quoting State v. Echols, 199 N.J. 344, 358 (2009)).

Here, trial counsel faced insurmountable obstacles. Defendant's statement to police admitted criminal conduct, albeit he adamantly denied ever penetrating S.K.'s vagina. Defendant acknowledged his criminal conduct to

several other people; his incriminating text messages were shown to the jury. After successfully moving to have defendant's prior guilty plea withdrawn, trial counsel adopted the only strategy available, specifically, he attempted to have the jury acquit defendant of the first-degree offenses, which have as an element sexual penetration. The credibility of S.K., the alleged victim of those first-degree crimes, became the cornerstone of the defense. Simply put, "[t]he quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006) (citing State v. Marshall, 123 N.J. 1, 165 (1991)).

Defendant properly points out that appellate counsel's explanation for why she failed to raise the issue on direct appeal is unsatisfactory, given the court's rejection of res gestae in State v. Rose, 206 N.J. 141 (2011), decided well before the trial in this case. However, given the overwhelming evidence, defendant cannot meet the second prong of the Strickland/Fritz standard. In other words, even if appellate counsel had successfully raised the issue on direct appeal, it would not have resulted in a reversal of defendant's convictions.

D.

Defendant asserts Pastor Glass' contact with police after defendant made incriminating privileged statements to him "constituted the sole basis for instituting a police investigation," and trial and appellate counsel rendered ineffective assistance by failing to raise a "fruit of the poisonous tree" argument regarding defendant's statement to police and much of the State's evidence.

Defendant also contends the trial judge's conclusion that the evidence was admissible under the "inevitable discovery" or "independent source" doctrines was legally incorrect. He argues the issue should have been raised on direct appeal. To avoid the procedural bar posed by Rule 3:22-4, defendant argues in a separate point that enforcement of that procedural bar would result in a "fundamental injustice."

Regarding the IAC aspect of this claim, as the PCR judge noted, the trial judge specifically addressed the issue by concluding that the statements defendant made after his privileged disclosure to Pastor Glass were admissible. Even a cursory review of the record reveals the fallacy of defendant's ineffective assistance claim against trial counsel. Trial counsel did make the argument that defendant's statement to police was tainted by the breach of

N.J.R.E. 511, but he did not prevail. We reject defendant's claim that counsel's brief was insufficient or his argument not forceful enough.

Appellate counsel's explanation for not raising the issue was confusing. She did not think that making a "fruit of the poisonous tree" argument "would be of much effect," given "the number of witnesses who overheard [defendant] making admissions about his conduct." We assume appellate counsel meant that had the argument been raised successfully on appeal, it would not have resulted in the reversal of defendant's conviction.

Appellate counsel was not ineffective because had the argument been specifically raised, it would have failed. Worlock, 117 N.J. at 625. Simply put, defendant's statement to Pastor Glass, and Glass' contact with police, did not constitute the only basis for the commencement of an investigation. Defendant made statements to other people before he spoke with the pastor. J.S. testified, for example, that she intended to bring her daughter to speak with investigators, and Vrablic said that he intended to go to the police if the pastor did not.

"A petitioner is generally barred from presenting a claim on PCR that could have been raised at trial or on direct appeal [by] Rule 3:22-4(a)." Nash, 212 N.J. at 546. An exception exists if the petitioner can demonstrate

"enforcement of the bar to preclude claims . . . would result in a fundamental injustice." R. 3:22-4(a)(2). "Our courts will find fundamental injustice when the judicial system has denied a 'defendant with fair proceedings leading to a just outcome' or when 'inadvertent errors mistakenly impacted a determination of guilt or otherwise wrought a miscarriage of justice.'" Nash, 212 N.J. at 546 (quoting State v. Mitchell, 126 N.J. 565, 587 (1992)).

As already noted, the trial judge correctly rejected any claim that defendant's statement to police, or the other substantial evidence the State marshaled to convict defendant, was the "fruit of the poisonous tree," i.e., defendant's privileged communications with his pastor. There was no fundamental injustice caused by the failure to raise the issue on direct appeal.

E.

Defendant's remaining IAC claims require only brief discussion. The PCR judge correctly rejected defendant's arguments regarding trial counsel's failure to request jury instructions on lesser-included offenses, to object and move for a mistrial because of prosecutorial misconduct, and appellate counsel's failure to raise these issues on direct appeal. As to the lesser-included offenses, the argument is limited to the three counts of aggravated sexual assault, with defendant contending counsel should have asked for a

charge on the lesser-included offense of aggravated sexual contact, particularly since the defense's sole focus was on the element of penetration.

However, the three counts that preceded the three aggravated sexual assault charges in the indictment alleged the offense occurred during the same timeframes and in the same place. In other words, the jury was given the opportunity to convict defendant of the lesser-included charge and not the greater charge. It rejected that option, finding defendant guilty on all six counts.

Defendant's IAC claim premised on trial counsel's failure to object to alleged prosecutorial misconduct during trial or appellate counsel's failure to raise the issue on appeal lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). The prosecutor's comments were not so egregious as to have required reversal.

Similarly, defendant's IAC claims that trial counsel: inadequately cross-examined S.K. by not confronting her with Dr. Lanese's report; failed to argue that defendant's use of the term "excitement spot" in his statement to police did not mean he penetrated the victim's vagina; was ineffective for conceding defendant's guilt as to some counts of the indictment, all lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). It suffices to say

that given our conclusions, defendant's claim that the cumulative effect of counsel's deficient performance warrants a new trial also lacks merit.

Defendant's multiple admissions to multiple people placed trial counsel in a position where he had no other strategy but to admit defendant's guilt of some of the counts of the indictment. None of the other claimed failures by counsel evidence deficient performance, and, even if they did, they could not have affected the outcome.

III.

Lastly, defendant argues "new" authority from our Supreme Court, specifically its decision on Tillery, makes his challenge to the statement he gave police cognizable on PCR pursuant to Rule 3:22-2(a). The PCR judge reviewed this in the context of an IAC claim, which it was not. He also determined Tillery was inapplicable, the claim could have been raised on direct appeal, and that the trial judge decided the issue when he ruled defendant's statement was admissible. See R. 3:22-5 (barring PCR claims where there has been "[a] prior adjudication upon the merits" in any prior proceeding). However, the specific argument defendant now raises was not adjudicated by the trial judge and was not raised on direct appeal. It is not barred by Rule 3:22-5.

The argument might be procedurally barred under Rule 3:22-4(a), i.e., that it could have been raised on direct appeal and was not. However, the Court decided Tillery in 2019, years after this case was tried and defendant's direct appeal was decided. Under Rule 3:22-4(a)(1), a petitioner may assert a "ground for relief not previously asserted" if it "could not reasonably have been raised in any prior proceeding." This is the proper context for consideration of defendant's argument.

In Tillery, the Court found that the use of a typical Miranda card by State Police investigators "d[id] not reflect optimal law-enforcement practice." 238 N.J. at 318. The Court explained:

It did not guide an interrogating officer . . . to ensure that the suspect had waived those rights before questioning began. Instead, the card ambiguously stated that by signing, the suspect acknowledged that he or she had been "advised of the constitutional rights found on the reverse side of this card." In short, the Miranda card used in this case invited an incomplete inquiry on the question of waiver.

. . . Miranda cards and other written forms used by law enforcement in New Jersey should direct the interrogating officer to address the question of waiver in the Miranda inquiry. Miranda waiver cards and forms should guide an officer to ask whether the suspect understands his or her rights, and whether, understanding those rights, he or she is willing to answer questions.

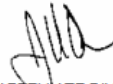
[Ibid.]

Defendant argues that a similar Miranda card was used in this case, and defendant never knowingly and voluntarily waived his right to remain silent.

Unfortunately for defendant, the record of the interrogation does not support his claim. While it is true that a similar Miranda card was used here, the colloquy that followed contains defendant's explicit acknowledgement of Detective Miller's advice that he "was free to go," and that defendant's willingness to stay and speak with him was of his "own will and volition." While the Miranda card may have only demonstrated defendant was advised of his rights, the ensuing colloquy shows defendant knowingly and voluntarily waived those rights.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION