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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3151-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN WARD,

Defendant-Appellant.

Submitted May 30, 2023 – Decided June 14, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 13-10-1301.

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

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Thomas James Livecchi, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the April 15, 2021 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Following a 2016 bifurcated jury trial, defendant was found not guilty of attempted murder but was convicted of the lesser-included offense of third-degree aggravated assault with a deadly weapon, N.J.S.A. 2C:12-1(b)(2). He was also convicted of two counts of fourth-degree aggravated assault with a firearm, N.J.S.A. 2C:12-1(b)(4); two counts of third-degree terroristic threats, N.J.S.A. 2C:12-3(a); two counts of second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); and second-degree certain persons not to possess firearms, N.J.S.A. 2C:39-7(b)(1). Defendant was sentenced to an aggregate term of thirty years of imprisonment, with fifteen years of parole ineligibility. We affirmed his convictions and sentence in an unpublished opinion and the Supreme Court denied certification, State v. Ward, No. A-4235-15 (App. Div. Apr. 4, 2018) (slip op. at 4), certif. denied, 235 N.J. 461 (2018).

The facts and procedural history of the case are detailed in our unpublished opinion and need not be repeated at length here. To summarize,

[t]he convictions stemmed from a [May 17, 2013] violent attack in which defendant lured his estranged wife and her friend to his house under false pretenses and threatened them at gunpoint. Prior to the attack,

defendant had followed his estranged wife on four different occasions, which conduct was admitted [at trial] under N.J.R.E. 404(b).

[Id. at 2.]

During her trial testimony, defendant's wife described the four prior incidents as follows:

According to [defendant's wife], the first incident occurred when [she] discovered defendant was parked three houses away from her mother's house, on the opposite side of the street. The second incident occurred while [she] was delivering water to a friend. While her friend's son was unloading the water from her car, defendant drove up "out of [nowhere], . . . tapped [her] car, jumped out [of] the car, [and] started screaming and yelling." The third incident occurred when [she] was leaving the gym and saw defendant's truck outside. The fourth incident occurred when [she] was driving with her brother in the car, and defendant, who was driving past her in the opposite direction, "turned [his car] around in the middle of the street and proceeded to follow [her]." Once defendant realized that it was her brother in the car with her, "he turned around, [and] went another way."

[Defendant's wife] testified that although the incidents made her fearful, she never called the police or obtained a restraining order because she did not want "him to hurt [her] family." During cross-examination, [defendant's wife] admitted that in a subsequent police interview, she denied having a history of domestic violence with defendant. She also admitted that during their separation, she would "still go to the house every[day]" in order "to pick up [her] mail" or "get

clothes," and would "sit and watch television with [defendant] sometimes."

[Id. at 4-5 (fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, fifteenth, eighteenth, and nineteenth alterations in original).]

Although the trial judge had "directed the State and its witnesses to refrain from using the terms 'stalking' and 'domestic violence,' as they [were] 'legal term[s]' that [were] 'very loaded' and 'very prejudicial,'" id. at 14 (second alteration in original) (footnote omitted), the judge did not give a limiting instruction after defendant's wife's testimony, nor in his final charge to the jury. Id. at 15-16.

In his direct appeal, defendant challenged the admission of his wife's testimony on three separate grounds.

First, defendant argue[d] the court erred by admitting [his wife's] testimony about him following her, spying on her, and intimidating her family under N.J.R.E. 404(b). Second, defendant argue[d] the court erred by failing to give the jury limiting instructions on the permissible use of the N.J.R.E. 404(b) evidence. Third, defendant argue[d] the judge compounded these errors by allowing [his wife] to testify that she never called the police because she was afraid defendant would hurt her family, thereby portraying defendant "as a jealous, controlling, and violent man."

[Id. at 9.]

We determined the trial judge did not abuse his discretion in admitting the evidence under N.J.R.E. 404(b). Id. at 14. Although we held the judge erred in failing to give a limiting instruction, we determined the error was invited because "[d]efense counsel agreed with the judge that the evidence presented at trial was not as damaging to defendant as the parties had anticipated," and

defense counsel used the prior acts and [defendant's wife's] past failure to call the police to defendant's advantage by characterizing the May 17, 2013 incident as merely the latest in a string of failed attempts to reconcile with his estranged wife, rather than an attempt to hurt her. Indeed, the defense was partially successful because the jury acquitted defendant of the most serious charge in the indictment, first-degree attempted murder.

[Id. at 19-20.]

Moreover,

given the overwhelming evidence of defendant's guilt, including the contemporaneous 9-1-1 tape recording,^[1] police officers' observations of defendant holding a gun to [his wife's] head, and the recovery of the handgun in defendant's kitchen, we conclude[d] that any error resulting from the judge allowing [defendant's wife] to testify that she feared defendant would harm her family was harmless.

¹ After defendant's wife's friend escaped, she promptly called the police, leading to defendant's wife's release unharmed. The friend testified at trial and her "9-1-1 call to the police was played for the jury." Id. at 7 n.4.

[Id. at 20-21.]

In 2019, defendant filed a timely pro se PCR petition challenging his convictions and sentence on various grounds. The petition was later supplemented after the assignment of counsel. Pertinent to this appeal, in his petition, defendant asserted that he received ineffective assistance of counsel (IAC) because his trial counsel: (1) failed to adequately investigate the case and call two witnesses to attest to his wife's ulterior motive "to support [a] passion provocation defense"; (2) twice opened the door to the admission of "domestic violence accusations" despite the trial judge's prior warning; and (3) failed to "properly advise [him] of his right to testify in his own defense." To support his PCR claim, defendant produced statements from the two uncalled defense witnesses attesting to his wife's "manipulative" and "devious" nature.

Following oral argument, on April 15, 2021, the PCR judge issued an order and accompanying written opinion denying defendant's petition. In his opinion, the judge reviewed the factual background and procedural history of the case, applied the governing legal principles, and concluded defendant failed to establish a prima facie claim of IAC. Specifically, the judge determined defendant failed to show that either his attorney's performance fell below the objective standard of reasonableness set forth in Strickland v. Washington, 466

U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 49-58 (1987), or that the outcome would have been different without the purported deficient performance as required under the second prong of the Strickland/Fritz test. The judge also concluded that defendant was not entitled to an evidentiary hearing.

In rejecting defendant's claim that his attorney failed to conduct an adequate investigation, the judge pointed out that trial counsel had provided a "witness list . . . to the [c]ourt" containing "forty-three . . . potential defense witnesses and proffers from nine . . . of those witnesses." Further, "investigation reports containing the proffers of potential defense witnesses [were] dated from as early as March 7, 2014[,] through June 3, 2014." Although the judge acknowledged that the two witnesses in question "were omitted from th[e] list" and had not been interviewed by trial counsel, after reviewing the statements submitted in support of defendant's PCR petition, the judge determined neither witness's testimony would have "addressed a significant fact in the case."

In that regard, the judge explained that one witness, who was defendant's wife's former romantic partner, had told the interviewer that defendant's wife "had bad character, and gave specific examples including her opening credit cards under his name without permission, owing him money for back rent,

moving a man into his home while he was away, among other wrongdoings." The other witness, who characterized defendant's wife as a "whore," similarly impugned her character, stating she "want[ed] to keep [defendant] incarcerated because she want[ed] the house and a divorce." The judge pointed out that the omission of the witnesses did not prejudice defendant's case because "the jury found [defendant] not guilty of attempted murder and the lesser included offense of passion provocation murder." Thus, according to the judge, defendant failed to show "a reasonable probability of a different outcome had trial counsel called these witnesses or conducted further investigation."

Turning to defendant's claim that trial counsel failed to adequately advise him of his right to testify, relying on State v. Ball, 381 N.J. Super. 545 (App. Div. 2005),² the PCR judge explained:

Here, [defendant] alleges that trial counsel did not discuss his right to testify in his own defense. However, [defendant] does not provide any evidence in support of this claim. As mentioned by the State and evidenced in the trial transcripts, the [trial c]ourt reviewed with [defendant] his option to testify in his own defense. Moreover, [defendant] has not established how trial counsel's failure to discuss his

² In Ball, we held that the defendant had not met the two-prong Strickland/Fritz test where, "regardless of whether defendant was advised by counsel, the trial judge fully explained defendant's right to testify, the possible consequences of his choice and the option to have the jury instructed to draw no inference from defendant's choice not to testify." 381 N.J. Super. at 557.

right to testify has resulted in prejudice. Thus, without more, [defendant's] claim of ineffective assistance does not satisfy the two-prong test under Strickland.

Finally, regarding trial counsel "'opening the door' to domestic violence accusations," the PCR judge acknowledged that "the trial court prohibited both parties from any testimony relating to domestic violence, TROs, and FROs, unless [defendant] took the stand." Further, according to the judge, "[i]t [was] indisputable that trial counsel did not heed those warnings and on at least two occasions, questioned [defendant's wife] about a possible restraining order," prompting the prosecutor "[o]n redirect" to elicit from defendant's wife that the reason she did not call the police was "[she] was scared for [her] life." As such, the judge determined that trial counsel's conduct in that regard "satisfie[d] the first prong under Strickland," as it was "objectively unreasonable . . . for counsel to blatantly disregard a direct instruction from the [c]ourt."

However, the judge concluded defendant was not entitled to relief under the second Strickland prong because he "was not prejudiced by counsel's error." The judge reasoned that "trial counsel was developing the testimony in a light that was favorable to [defendant], and was able to successfully elicit information from the witness that demonstrated a lack of domestic violence history between the victim and [defendant] before this incident." In any event, the judge was not

convinced that the error "was . . . so serious as to undermine the court's confidence in the jury's verdict or the result reached."

In this ensuing appeal, defendant raises the following point for our consideration:

THE PCR COURT IMPROPERLY DENIED DEFENDANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING.

[A].³Trial Counsel's Failures To Conduct A Timely Investigation As To Potential Defense Witnesses, And To Call Those Witnesses At Trial Constituted [IAC].

[B]. Trial Counsel Was Ineffective For Failing To Adequately Apprise Defendant Of His Right To Testify In His Own Behalf At Trial.

[C]. Trial Counsel Was Ineffective For Repeatedly Opening The Door To Prejudicial Testimony Regarding Domestic Violence Restraining Orders.

"[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). "If the court perceives that holding

³ We eliminated the point heading regarding the applicable standard of review and renumbered the remaining headings accordingly.

an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR], . . . then an evidentiary hearing need not be granted." State v. Marshall, 148 N.J. 89, 158 (1997) (citations omitted).

An evidentiary hearing is only required when a defendant establishes "'a prima facie case in support of [PCR]," the court determines that there are "material issues of disputed fact that cannot be resolved by reference to the existing record," and the court determines that "an evidentiary hearing is necessary to resolve the claims" asserted. State v. Porter, 216 N.J. 343, 354 (2013) (alteration in original) (quoting R. 3:22-10(b)). "[W]here . . . no evidentiary hearing was conducted," as here, "we may review the factual inferences the [trial] court has drawn from the documentary record de novo," and "[w]e also review de novo the court's conclusions of law." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016).

"To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits." R. 3:22-10(b). To establish a prima facie IAC claim, a defendant must demonstrate "by a preponderance of the credible evidence," State v. Echols, 199 N.J. 344, 357 (2009), that: (1) counsel's performance was deficient; and (2) the deficient

performance prejudiced the defense, Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58.

Failure to meet either prong of the Strickland/Fritz test results in the denial of a petition for PCR. State v. Parker, 212 N.J. 269, 280 (2012) (citing Echols, 199 N.J. at 358). That said, "courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012) (citation omitted) (citing Strickland, 466 U.S. at 697).

When considering Strickland's first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption" that counsel's performance was reasonable. Strickland, 466 U.S. at 689. "In evaluating whether defense counsel has satisfied the duty to make reasonable investigations, the reviewing court must apply 'a heavy measure of deference to counsel's judgments.'" State v. Chew, 179 N.J. 186, 217 (2004) (quoting Strickland, 466 U.S. at 691). Under that standard, as long as trial counsel "makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is 'virtually unchallengeable.'" Ibid. (quoting Strickland, 466 U.S. at 690). Likewise, "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.'" State v. Arthur, 184 N.J. 307, 321 (2005) (citation omitted) (first quoting Strickland, 466 U.S. at 693; and then quoting Strickland, 466 U.S. at 689).

To satisfy the prejudice prong, a defendant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "Important to the prejudice analysis is the strength of the evidence that was before the fact-finder at trial." State v. Pierre, 223 N.J. 560, 583 (2015). As such, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696.

Applying these principles, we discern no abuse of discretion in the judge's decision denying defendant's PCR petition without an evidentiary hearing, and we affirm the denial of PCR substantially for the reasons stated in the judge's comprehensive and well-reasoned written opinion. The judge thoroughly and accurately addressed defendant's contentions, and the arguments raised on appeal, which are identical to the ones rejected by the judge, are without sufficient merit to warrant further discussion here. R. 2:11-3(e)(2).

Affirmed.

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

A handwritten signature in black ink, appearing to be the initials 'JLD'.

CLERK OF THE APPELLATE DIVISION