RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3376-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAREL ASHLEY, a/k/a
ANDRE D. ASHLEY,
DAREL A. ASHLEY,
DARRELL A. ASHLEY,
DARRELL D. ASHLEY,
DARREL ASHLEY, and
EDWARD DAVIS,

Defendant-Appellant.

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Submitted December 20, 2022 – Decided March 8, 2023

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 13-02-0547.

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

William E. Reynolds, Atlantic County Prosecutor, attorney for respondent (Mario C. Formica, Deputy First Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant, Darel Ashley, appeals from a May 28, 2021 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. He contends his appellate counsel rendered ineffective assistance by failing to appeal the denial of his motion to suppress the electronically recorded stationhouse interrogation. Defendant also argues his trial counsel was ineffective by allowing the jury to hear what he now characterizes as evidence of his prior crimes. After carefully reviewing the record in light of the governing legal principles, we affirm substantially for the reasons expressed by Judge Patricia M. Wild in her cogent oral decision.

I.

In January 2013, defendant was charged in a superseding indictment with first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(7); second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1); third-degree sexual assault, N.J.S.A. 2C:14-2(c); third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a); and third-degree terroristic threats, N.J.S.A. 2C:12-3(a).

Defendant was tried before a jury in May 2014. The facts adduced at trial are thoroughly recounted in our prior decision and need not be repeated here. State v. Ashley, No. A-4849-14 (App. Div. Jan. 23, 2017). The jury convicted defendant of two counts of fourth-degree criminal sexual contact—a lesser included offense, N.J.S.A. 2C:14-3(b); third-degree endangering the welfare of a child; and third-degree terroristic threats.

On February 20, 2015, defendant was sentenced on the endangering conviction to an extended ten-year prison term with a five-year period of parole ineligibility. The trial court imposed a consecutive five-year prison term with a two-and-one-half-year period of parole ineligibility on the terroristic threat conviction. The court merged the criminal sexual contact counts and imposed a concurrent eighteen month prison term. In January 2017, we affirmed defendant's convictions and sentence on direct appeal. Ashley, slip op. at 1.

On May 25, 2012, Judge Wild heard argument on defendant's PCR petition and denied relief without an evidentiary hearing, rendering a thorough oral opinion. Defendant raises the following contentions for our consideration:

> POINT I
>
> THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE THE DEFENDANT ESTABLISHED A PRIMA FACIE

CASE OF APPELLATE AND TRIAL COUNSELS' INEFFECTIVENESS.

A. APPELLATE COUNSEL FAILED TO PURSUE THE DENIAL OF DEFENDANT'S MOTION TO SUPPRESS HIS INCRIMINATING STATEMENT.

B. TRIAL COUNSEL ALLOWED EVIDENCE OF DEFENDANT'S PRIOR CRIMINALITY TO BE DISCLOSED TO THE JURY.

II.

Because the trial court rendered its decision without an evidentiary hearing, we review both its legal and factual determinations de novo. State v. Harris, 181 N.J. 391, 421 (2004). However, "we 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).

A defendant bears the burden of proving by a preponderance of the credible evidence that he or she is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013); State v. Preciose, 129 N.J. 451, 459 (1992). To sustain that burden, the defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

To obtain an evidentiary hearing, a defendant "must do more than make bald assertions that he [or she] was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Rather, trial courts should grant evidentiary hearings only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed facts lie outside the record, and resolution of those issues necessitates a hearing. R. 3:22-10(b); see also State v. Porter, 216 N.J. 343, 354–55 (2013).

Both the Sixth Amendment of the United States Constitution and Article 1, Paragraph 10 of our State Constitution guarantee to criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). In order to demonstrate ineffectiveness of counsel, the defendant must first "show that counsel's performance was deficient," and second, "must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. In Fritz, our Supreme Court adopted the two-part test articulated in Strickland. 105 N.J. at 67.

To meet the first prong of the Strickland/Fritz test, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687.

Reviewing courts indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. The second prong of the Strickland/Fritz test requires the defendant to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Put differently, counsel's errors must create a "reasonable probability" that the outcome of the proceedings would have been different if counsel had not made the errors. Id. at 694.

Claims of ineffective assistance of appellate counsel must assert that errors existed at the trial level that could have been ascertained by appellate counsel's review of the record but were never raised as issues on appeal. See State v. Echols, 199 N.J. 344, 361 (2009). To obtain a new trial based on ineffective assistance of appellate counsel, a defendant must establish that appellate counsel failed to raise an issue that would have constituted reversible error on direct appeal. See ibid. Appellate counsel will not be found ineffective if counsel's failure to appeal the issue could not have prejudiced the defendant because the appellate court would have found either that no error had occurred or that any error was harmless. State v. Reyes, 140 N.J. 344, 365 (1995); see also Harris, 181 N.J. at 499.

Furthermore, appellate counsel has no duty to raise every non-frivolous argument available to a defendant. State v. Gaither, 396 N.J. Super. 508, 515 (App. Div. 2007) (citing Jones v. Barnes, 463 U.S. 745, 753–54 (1983)). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 751–52.

III.

We first address defendant's contention his appellate counsel rendered ineffective assistance by failing to appeal the denial of the motion to suppress the electronically recorded stationhouse interrogation. Defendant does not challenge the voluntariness of the Miranda[1] waiver. Rather, he argues that his comment to the interrogating detective, "I'm not going to make no statements," invoked the right to remain silent, which was not scrupulously honored in violation of the rule set forth in State v. Hartley, 103 N.J. 252, 256 (1986).

To put defendant's assertion in context, we reproduce verbatim the pertinent portion of the exchange that occurred immediately after the interrogating detective finished reading the Miranda warnings:

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[DETECTIVE]: Sir, do you understand your rights?

[DEFENDANT]: Yes, I do.

[DETECTIVE]: Okay. Now I want to ask you some questions so do you want to talk to me?

[DEFENDANT]: Of course, I do.

[DETECTIVE]: Okay. What I need you to do -- I'm going to circle yes here, and I need your initial there.

[DEFENDANT]: Yes.

[DETECTIVE]: And then you want to talk to me, so I'm going to circle yes again.

[DEFENDANT]: Yes.

The detective then asked defendant to provide his name, address, social security number and age for the Miranda form. Referring to the form, the exchange continued:

[DETECTIVE]: And I need your initial here, for yes.

[DEFENDANT]: All right. That's that I'm going to talk, right?

[DETECTIVE]: Yes, sir. Well, that you understand your rights?

[DEFENDANT]: I understand them. I can read them backwards and forwards.

[DETECTIVE]: And I need you to initial that you want to talk to me.

[DEFENDANT]: Yes, indeed.

[DETECTIVE]: Okay. And then please sign your name next to your name.

[DEFENDANT]: I'm not going to make no statements, I'm telling you right now.

[DETECTIVE]: Thanks.

[DEFENDANT]: You're welcome.

The record shows defendant initialed and signed the Miranda form. The record also shows that during the interview, defendant requested to make a phone call to his wife, which the detective immediately granted. As confirmed by the video, the detective helped defendant dial the number and then left the room to give him privacy.

The present facts are substantially similar to those addressed in State v. Adams, 127 N.J. 438 (1992). In that case, the defendant refused to make a written statement but was willing to make an oral statement. Id. at 442. Adams signed the Miranda waiver form but wrote on the form "I do not wish to give a statement at this time." Ibid. The Court rejected Adams's contention that his written caveat "unequivocally invoked the right to silence for all purposes." Id. at 446. The Court reasoned,"[d]efendant never invoked the right to silence beyond his refusal to sign a written statement. Any confusion about

[defendant's] intent . . . is dispelled by his contemporaneously-stated, unambiguous willingness to talk to [the detective] about the circumstances surrounding the shooting." Ibid. The Court explained that "[w]hen a defendant does not invoke his or her Miranda rights, an examination of whether those rights were scrupulously honored [as outlined in Hartley] is not necessary." Id. at 445. The Adams Court further commented that "[a] police officer has no duty to probe for a defendant's unstated misconceptions about the effect of the waiver of Fifth Amendment rights." Id. at 449. It is not for law enforcement officers to "pinch-hit for counsel" and advise defendants of the admissibility of oral statements. Ibid. (quoting Oregon v. Elstad, 470 U.S. 298, 316 (1985)).

Adams provides clear guidance in the matter before us. Considering defendant's contemporaneously stated, unambiguous willingness to talk, see id. at 446, it is clear he never invoked the right to silence beyond his refusal to "make a statement." At no point did defendant ask for the interrogation to stop or assert that he no longer wanted to answer questions. The only limitation he expressed was that he did not want to provide a statement. Defendant was properly advised of his Miranda rights, including the warning that anything he said could be used against him in court. Moreover, as our Supreme Court made

clear in Adams, the interrogating detective had no duty to advise defendant as to the legal effect of his oral statements beyond reading the Miranda warnings.

Because defendant did not have a meritorious claim for his appellate counsel to pursue, the PCR court correctly ruled that defendant failed to establish a prima facie case that appellate counsel rendered ineffective assistance. See Harris, 181 N.J. at 499. We add that the present record—the electronic recording of the stationhouse interrogation—is adequate to resolve the legal issue defendant raises on PCR. There are no material issues of disputed facts that lie outside the record, and thus resolution of the newly framed legal issue does not require an evidentiary hearing. See R. 3:22-10(b); State v. Marshall, 148 N.J. 89, 157–58 (1997).

IV.

The PCR court likewise correctly rejected defendant's contention his trial counsel was constitutionally ineffective by failing to object to three portions of the stationhouse interrogation played for the jury in which defendant stated: (1) that any pending charges in this case "would not go good on my record"; (2) "I thought I was here for unpaid fines"; and (3) "I need bail money." Defendant argues those statements are evidence of his prior criminality and should have been objected to by his trial counsel.

The three challenged statements, however, did not reasonably suggest to the jury that defendant had previously been convicted of a crime. Defendant's first statement, that any pending charges in this case "would not go good on my record," refers prospectively to the effect of the present charges. The third remark, "I need bail money," also refers to the present charges, not to prior convictions. The fleeting reference to unpaid fines would tend to refer to minor offenses, not the serious crimes that comprise defendant's criminal history. Having reviewed those isolated remarks in context, the PCR court found they did not have a "nexus to his prior criminal record" and merely showed "a generalized knowledge of the criminal justice system." We agree with the conclusion of the PCR judge that the statements did not constitute evidence of prior criminality and thus that defendant did not have a meritorious claim for either his trial or appellate counsel to pursue.

Nor has defendant established the second prong of the Strickland/Fritz test, which requires him to show that counsel's errors were so serious as to deprive him of a fair trial. Strickland, 466 U.S. at 687. Defendant has failed to show that striking those remarks would have given rise to a "reasonable probability" that the outcome of the proceedings would have been different. Id. at 694. We note in this regard the State's evidence of guilt was substantial if not

overwhelming. In addition to the victim's detailed testimony, the State introduced scientific testimony that semen found on the fifteen-year-old victim's jeans matched defendant's DNA. Additionally, the State produced video surveillance footage showing defendant and the victim together inside the casino, defendant and the victim walking to the boardwalk exit, defendant returning to the casino by himself, and the victim returning shortly thereafter "screaming and banging for help and flagging down security."

In sum, defendant has failed to establish a prima facie case to warrant an evidentiary hearing, much less to vacate his convictions and award a new trial. See Preciose, 129 N.J. at 462–63. To the extent we have not specifically addressed them, any remaining arguments raised by defendant in this appeal lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.