

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0058-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALBERTO SALAZAR,

Defendant-Appellant.

Submitted September 14, 2017 — Decided October 6, 2017

Before Judges Alvarez and Nugent.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
01-03-0349.

Joseph E. Krakora, Public Defender, attorney
for appellant (Carolyn V. Bostic, Designated
Counsel, on the brief).

Thomas K. Isenhour, Union County Prosecutor,
attorney for respondent (Milton S. Leibowitz,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

This case involves defendant's application for post-conviction relief (PCR) from his felony murder conviction and

sentence. Following our remand for a hearing on defendant's PCR petition, the trial court conducted a hearing to determine why defendant's trial counsel had not presented the testimony of a medical expert. The expert wrote a report questioning whether the injuries the victim sustained in a fall during the robbery caused defendant's death. Based on counsel's testimony during the remand hearing, which the trial court found credible, the court concluded trial counsel made a strategic decision not to call the expert. For that reason, the trial court denied defendant's PCR petition.

Adhering to our standard of review, we accept the trial court's credibility determinations and consequent finding that trial counsel's decision not to call the medical expert was strategic. Such strategic decisions, which are always subject to second-guessing, are generally not grounds for reversing a conviction based on the ineffective assistance of trial counsel. This case presents no exception. Accordingly, we affirm.

A jury convicted defendant of second-degree reckless manslaughter, N.J.S.A. 2C:11-4(b)(1), first-degree felony murder, N.J.S.A. 2C:11-3(a)(3), and second-degree robbery, N.J.S.A. 2C:15-1. The trial court merged the three convictions and sentenced defendant on the felony murder count to a thirty-year prison term without parole. We affirmed his conviction on direct appeal, State v. Salazar, No. A-6235-03 (App. Div. Feb. 6, 2008), and the

Supreme Court denied defendant's petition for certification, 195 N.J. 523 (2008).

Four months after the Supreme Court denied defendant's petition for certification, he filed a PCR petition, which the trial court denied without an evidentiary hearing. Defendant appealed. We reversed and remanded for a hearing. State v. Salazar, No. A-2504-11 (App. Div. May 21, 2014). Following the hearing on remand, the trial court again denied defendant's PCR petition. This appeal followed.

The following facts, which the State established at trial, provide context for defendant's PCR claim. The victim, age eighty-eight, lived alone on the third floor of an apartment complex. One morning, the complex's manager found the victim on her kitchen floor lying on her back. She had been robbed. The manager called 9-1-1, an ambulance responded, and Emergency Medical Technicians transported the victim to the hospital, where she died the following day. On the evening of the robbery, police officers canvassing the courtyard outside the apartment building found a plastic bag containing the victim's purse and a black ski mask. The State stipulated they had tested saliva found on the ski mask and determined it was inconsistent with defendant's DNA, but was consistent with that of defendant's son.

The next night, detectives questioned defendant, who gave this account of the crime:

I went back to Miss Feehan's and she was on her way walking towards me in the hallway. Then she handed me \$2 and 25 cents. I came down the stairs, went to the store, picked up the coffee and bun. I went back into the building, got into my apartment and told my other daughter to get ready to work and she answered me that she was tired and she wasn't going to go.

Then I went to Miss Feehan's apartment with the coffee and the bun. I got into the apartment. The door wide open like always. Miss Feehan was sitting on the couch in the living room. I helped her get up from the couch, took her to the kitchen, put the coffee and the bun on the table and she was standing by the table. And I walked back towards the living room and I saw the pocketbook. It was a chance for me to take the pocketbook which I picked up with my right hand. I started walking out. By the time I got to the front door Miss Feehan saw me and asked me what you do. I got scared. I had the pocketbook on my left side. I turned around facing her when she grabbed my left arm which I was holding the pocketbook in. I tried to get her off my arm by pulling my arm away from her. Her glasses fell off. Then she lost balance and fall straight back.

[Question by Detective]: Did you see her hit the floor?

[Answer by Defendant]: Yes.

[Question by Detective]: Did you think she lost consciousness when she hit the floor?

[Answer by Defendant]: Yes because she didn't make any sounds.

[Question by Detective]: What did you do next?

[Answer by Defendant]: I left the apartment and closed the door after me and went straight to my apartment with the pocketbook.

Defendant also admitted that after returning to his apartment, he placed the victim's purse in a plastic bag, took an elevator to the basement, opened the back door, and threw the bag into the backyard. Although acknowledging the ski mask belonged to his son, defendant denied knowing how it got into the plastic bag. He admitted using the mask the night before the robbery while chopping ice, but he claimed he had not worn it since then.

The State presented three medical witnesses: the victim's treating physician, an assistant county medical examiner, and a New York University Professor of Neuropathology. The victim's treating physician testified that during the two years preceding her death, the victim was an elderly lady but in good condition. During cross-examination, the doctor admitted hearing that after he last saw the victim but before her death, she had fallen and had been admitted to a nursing home.

According to the assistant county medical examiner who performed the autopsy on the victim the day she died, the cause of the victim's death was blunt force head trauma and the manner of death was homicide. When performing the autopsy, the doctor

observed "[m]ultiple bruises of the same age, some abrasions and predominantly . . . on the back of the head, on the top back of the head was [an] elongated bluish purplish bruise in a measure one and a half inch by three quarters of an inch." The coloring was significant because it indicated the bruise was recent, meaning it had occurred within hours as opposed to days. This and the other bruises were consistent with a single fall.

Beneath the bruise on the back of the victim's head was a subdural hemorrhage, that is, bleeding caused by a broken blood vessel. The assistant county medical examiner explained that such a hemorrhage "is going to compress the brain and can produce death or some neurological anomalies." He further explained, "[i]n this case there were subdural hemorrhages, that mean[s] blood . . . on the outside of the brain [on] both sides." The doctor testified the cause of the victim's death was blunt force trauma to her head, specifically, to the back of her head. He also explained the injury to the back of the victim's head caused the bleeding on both sides of the brain.

During cross-examination, the assistant county medical examiner identified a photograph confirming the victim had "small abrasions" on the top of her head in the front. He conceded the possibility these bruises were sustained at a different time than the bruises to the front of her body. Similarly, the doctor

identified abrasions on the victim's back that could have occurred on the same day but at a different time than bruises on the front of her body. The doctor testified bruises on the victim's left chest, left shoulder, back of the arms, and back of the head were caused by trauma. He reiterated the bruise on the back of the victim's head was consistent with an impact. The hemorrhages occurred within minutes to hours of the trauma.

The State's other medical witness, a New York University Professor of Neuropathology, examined the victim's brain. He corroborated the medical examiner's findings and testified there was no evidence she died from a stroke. He ruled out natural disease processes as the cause of her death.

Before defendant's trial started, his attorney obtained a report from a forensic pathologist. The report included the following opinion:

Responsibility for the head trauma which led to the stroke that ultimately caused [the victim's] death apparently was arbitrarily assigned to [defendant]. However, in view of the history and physical evidence of repeated falls in which [defendant] apparently was not involved, it cannot be stated with reasonable medical probability that he caused the fall that ultimately was responsible for her death.

Defense counsel did not present the testimony of the forensic pathologist. Rather, in her summation, she attempted to persuade the jury defendant's statement confessing the crime was so

inconsistent with the physical evidence that the jury should disregard it. She further argued the evidence the ski mask belonged to defendant's son was so strong it suggested he committed the crime. As noted, the jury rejected this defense.

Defendant's trial counsel was the only witness to testify at the remand hearing on defendant's ineffective-assistance claim. The forensic pathologist from whom she had received a report, Dr. John E. Adams, had died before the PCR hearing occurred.

Defendant's trial counsel testified that after receiving Dr. Adams' report, she compared it with those of the State's medical experts. Like the State's experts, Dr. Adams concluded the victim died as a result of head trauma. Trial counsel was questioned about this statement in Dr. Adams' report: "However, in view of the history and physical evidence of repeated falls in which [defendant] apparently was not involved, it cannot be stated with reasonable medical certainty that he caused the fall that ultimately was responsible for her death." In response, she said the statement was not a medical opinion. Counsel explained, "the idea was that [the victim] could have fallen, she could have fallen subsequently or before [defendant] pushed her, although there was no actual physical evidence that that in fact occurred." Trial counsel asserted that who caused the fall resulting in the victim's death was a question of fact. In addition, trial counsel testified

she cross-examined the assistant medical examiner and the victim's treating physician about other falls and other bruises the victim had sustained.

During cross-examination at the PCR hearing, trial counsel explained during her defense theory: defendant was not the person who committed the crime but confessed to draw attention away from his son. DNA evidence extracted from the ski mask supported that theory. Trial counsel testified she and defendant spoke about the defense. In her opinion, arguing the fall did not cause the victim's death was inconsistent with the defense theory that defendant was not present when the crime occurred. As counsel explained, "I would have basically had to argue [defendant] wasn't there, he didn't commit this robbery, he didn't commit this push, however if he did, then . . . the fall didn't cause her death." Counsel reiterated "there was really no evidence, concrete evidence in that direction." That is basically what she discussed with defendant.

Based on trial counsel's testimony, the trial court determined it was "counsel's strategic decision not to call Dr. Adams, the forensic pathologist, as a defense witness." The court further concluded "that for purposes of the defense, no medical expert witness testimony was required. Trial counsel's strategy of cross-examining the State's expert medical witnesses on the

issue of causation achieved the same result of challenging the witnesses' credibility and creating reasonable doubt as to the opinions of the State's experts." Acknowledging the defense medical expert's testimony "would have provided additional support for the theory that the victim's fall was caused by reasons other than the defendant's acts," the court nonetheless noted "defense counsel considered the victim's fall may have been due to her medical condition and questioned the State's witnesses regarding same."

For these reasons, the trial court determined defendant failed to show his trial counsel's representation fell below an objective standard of reasonableness, and further failed to show there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The trial court thus denied defendant's petition.

On appeal, defendant argues:

POINT I

TRIAL COUNSEL'S DECISION NOT TO CALL DR. ADAMS, WHOSE EXPERT TRIAL TESTIMONY WOULD HAVE NEGATED THE CAUSATION ELEMENT OF THE FELONY MURDER CHARGE, WAS NOT A SOUND TRIAL STRATEGY, AND CONSTITUTED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, PARAGRAPH 10 OF THE NEW JERSEY CONSTITUTION.

A. The Strickland Standard.

- B. None of Trial Counsel's Proffered Reasons Justify Her Failure to Call Dr. Adams Whose Report Negated the Causation Element of the Felony Murder Charge.
1. Contrary to Trial Counsel's Testimony, There Were Significant Differences Between Dr. Adams' Opinion and That of the State's Experts on the Issue of Cause of Death.
 2. Trial Counsel Was Mistaken, as a Matter of Law, in Concluding That Dr. Adams' Opinion, That Responsibility for the Head Trauma Which Caused the Victim's Death was "Arbitrarily Assigned" to Defendant, Was Not a Medical Opinion.
 3. The Fact That Trial Counsel Cross-Examined the State's Witnesses Regarding Their Medical Opinions Does Not Excuse Her Failure to Present Her Own Medical Expert to Challenge the State's Experts' Opinions.
 4. Dr. Adams' Opinion Was Not Only Useful, But Would Have Provided Essential Information Necessary For the Jury to Find Reasonable Doubt on the Causation Element of Felony Murder.
- C. Trial Counsel's Failure to Call Dr. Adams Constituted Ineffective Assistance of Counsel Under Strickland.

To prove ineffective assistance of counsel, a defendant must satisfy the Strickland two-part test by demonstrating "counsel's performance was deficient," that is, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S. Ct. 2052,

2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984); accord, State v. Fritz, 105 N.J. 42, 58 (1987). Matters falling under the purview of "trial strategy" do not support a claim of ineffective assistance of counsel. Fritz, supra, 105 N.J. at 54.

Here, trial counsel's decision not to call Dr. Adams as a witness was strategic. To be sure, there is merit to defendant's contention the doctor's testimony was not inconsistent with the primary defense theory, namely, defendant's son, not defendant, perpetrated the crimes. There is also some merit to defendant's argument that, contrary to trial counsel's assertion, there were significant differences between Dr. Adams' medical opinion and that of the State's expert witnesses. Fairly read, the State's experts were of the opinion that trauma that caused the victim's death was consistent with a recent impact to her head, which the jury could only have concluded occurred during the robbery, as defendant confessed. Dr. Adams' opinion, if believed, would have undermined the State's expert medical evidence concerning causation.

Nonetheless, as trial counsel testified at the PCR hearing, there was little factual support for Dr. Adams' opinion concerning causation being inconclusive. And it remains a legitimate strategy not to water down a stronger theory of defense with a weaker alternate theory. In this case, the State stipulated the ski mask

found in the bag with the victim's purse belonged to defendant's son. The State was unable to introduce any forensic evidence linking the ski mask to defendant. Thus, prospectively, one could have reasonably decided as a matter of trial strategy that presenting a tenuous causation theory might cause the jurors to believe defendant was presenting smokescreens in a weak attempt to undermine his confession. Such strategy could be viewed as creating the risk of losing credibility with the jury and eroding a defense supported by forensic evidence.

Although there were inconsistencies between trial counsel's testimony at the PCR hearing and the trial record, those inconsistencies were explainable in part by the lapse of time — twelve years — between the trial and trial counsel's testimony at the PCR hearing. In any event, the trial court found trial counsel's testimony at the PCR hearing "believable and . . . credible." The trial court's credibility determination is supported by sufficient credible evidence on the record, so we will not disturb it. State v. Gamble, 218 N.J. 412, 424 (2014).

Having concluded defense counsel made a strategic decision not to present Dr. Adams as a trial witness, we affirm the trial court's denial of defendant's PCR petition. Fritz, supra, 105 N.J. at 54.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION