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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-3728-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALEXIS ANDERSON, a/k/a  
ALEXIS ALLEN ANDERSON,  
a/k/a ALEXANDER ANDERSON,

Defendant-Appellant.

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Submitted January 31, 2017 – Decided June 8, 2017

Before Judges Messano and Suter.

On appeal from the Superior Court of New  
Jersey, Law Division, Mercer County,  
Indictment No. 06-02-0263.

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

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

PER CURIAM

Defendant Alexis Anderson appeals a February 26, 2014 order that denied his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

Following a ten-day jury trial, defendant was convicted of first-degree robbery, N.J.S.A. 2C:15-1;<sup>1</sup> third-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a); first-degree kidnapping, N.J.S.A. 2C:13-1(b); third-degree criminal restraint, N.J.S.A. 2C:13-2(a); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); and third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b).

Defendant was sentenced on the kidnapping charge to a twenty-year term of incarceration subject to an 85% period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. He also was sentenced to a concurrent sixteen-year term of incarceration on the robbery conviction, subject to NERA and to a concurrent five-year term for unlawful possession of a handgun. The other counts were merged. We affirmed defendant's

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<sup>1</sup> The original indictment cited N.J.S.A. 2C:12-1(b)(4). This was amended subsequently to N.J.S.A. 2C:15-1.

convictions in 2010 in an unpublished opinion. State v. Anderson, No. A-5878-07 (App. Div. July 21, 2010).<sup>2</sup>

## II.

We relate only so much of our earlier opinion as is necessary to resolve the issues in this appeal.

In the late afternoon of October 13, 2005, Shawn Riley was walking down the street in Trenton when a green minivan pulled up alongside him. Three men jumped out of the van, holding guns, and began to beat Riley. He was pushed into the van but as the van took off, its door somehow opened; Riley hung out of the van screaming for help as it sped down the street. At some point, some of Riley's clothes were taken, as were his cell phone, wallet and keys. The van slowed down as it headed down Martin Luther King Boulevard toward Olden Avenue, and Riley was able to jump out. He knocked on the door of a nearby house, and the occupants summoned an ambulance.

During the time that Riley was held in the van, five 9-1-1 calls were placed to report what was happening.

. . . .

When these calls were received, four members of the Mercer County Regional Violent Crime Interdiction Task Force were on patrol together. . . . [T]hey went in search of the green minivan.

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<sup>2</sup> We remanded solely to correct the statutory citation for defendant's first-degree robbery charge. The Supreme Court then denied co-defendant Marty Alston's (Alston) petition for certification. State v. Alston, 205 N.J. 77 (2011). The record is unclear whether defendant also petitioned for certification.

Within a few minutes, they saw a green minivan parked, with two black males getting out. Officer Volkert testified that "they appeared very nervous and they split up," one going to the right, one going to the left. One, subsequently identified as Anderson, had a laceration on his face.

. . . .

The officers observed blood on the outside of the van, on the driver's side window and door, and blood on the floor between the two front seats.

. . . .

The police later obtained a warrant to search the van. The front passenger door and seat were covered in blood. Within the van, the police found a handgun with blood on the frame and the handle, a pair of jeans, a pair of black gloves, a single glove, a cell phone case, a roll of duct tape, a roll of electrical tape, an aluminum bat completely wrapped in electrical tape and a leather restraining instrument with a chain to bind someone. The search did not turn up any black hoodies and neither Alston nor Anderson was wearing a black hoodie when he was stopped. The van was registered in Alston's name. DNA testing revealed the presence of Riley's blood in the van and on Anderson's clothing.

Riley did not identify Alston or Anderson from a photo array the police prepared. The police also attempted to locate the individuals who had called 9-1-1 but were unsuccessful. 9-1-1 records listed the addresses from which the calls had been placed but when police went to those addresses, no one would respond to their knocking on the doors.

Alston took the stand and testified in his defense.

. . . .

Anderson did not testify at the trial.

[State v. Anderson, supra, slip op. at 3-8.]

Defendant filed a pro se petition for PCR in March 2013, claiming ineffective assistance of counsel. Appointed counsel later filed a supplemental brief on defendant's behalf. Defendant alleged his trial counsel provided ineffective assistance by failing to discover the identities of individuals who had called 9-1-1 to report the robbery and kidnapping; by failing to interview those individuals; by failing to object to one segment of the jury charge; and by advising defendant not to testify on his own behalf. With representation from counsel, defendant further asserted his trial counsel failed to consult with him or adequately prepare the case.

Following oral argument, the PCR court denied defendant's petition, without an evidentiary hearing, in a written opinion dated February 26, 2014. Although defendant's PCR petition was filed beyond the five-year period permitted by Rule 3:22-12(a), the PCR court addressed the merits, finding that the "injustice or extenuating circumstances" exception of Rule 1:1-2 and Rule 3:22-4 applied.

The PCR court then found that defendant "fail[ed] to specify an instance where trial counsel did not perform his duties as a

reasonably competent attorney would have." Moreover, defendant did "not allege with any specificity how trial counsel failed to communicate with him or at what point he sought more contact to further his defense." Then, addressing defendant's claim that trial counsel "failed to locate and interview the individuals who placed the [9-1-1] calls [on] the night of the incident," the PCR court found "there [was] no showing that trial counsel was deficient in identifying the [9-1-1] callers" and it was "unknown whether they would have provided any information tending to exculpate [defendant]." Finally, because defendant did "not point to a specific instance in the trial transcripts to support his claims," the court rejected defendant's asserted objection to the jury charge. It then found "there [was] no showing of deficient performance by trial counsel" and rejected defendant's claim of prejudice, denying his request for an evidentiary hearing.

Defendant appealed presenting the following issues:

POINT I — THE COURT SHOULD REVERSE THE PCR COURT'S ORDER THAT DENIED DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF BECAUSE THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PROCEEDINGS BELOW.

A. Trial Counsel's Failure To Investigate and Discover the 9-1-1 Callers Constituted Ineffective Assistance of Counsel As Said Witnesses Would Have Bolstered The Defense's Theory Of The Case.

B. Trial Counsel's Failure To Object To The Trial Court's Unclear Instruction Amounted To Ineffective Assistance of Counsel.

C. Trial Counsel Provided Ineffectively [sic] Assistance of Counsel When He Imprudently Advised Defendant Not To Testify On His Own Behalf.

D. Appellate And Post-Conviction Relief Counsel Provided Ineffective Assistance To The Extent That They Failed To Raise The Complained-Of Errors During The Proceedings Below.

POINT II — THE COURT SHOULD REMAND THE MATTER FOR AN EVIDENTIARY HEARING.

We are not persuaded by any of these arguments.

### III.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). In order to prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test of establishing both that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698.

We discern no error by the PCR court in rejecting defendant's claim that his trial counsel failed to adequately investigate the case. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Chew, 179 N.J. 186, 217 (2004) (alteration in original) (quoting Strickland, supra, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695). In evaluating whether trial counsel adequately discharged that duty, "the reviewing court must apply 'a heavy measure of deference to counsel's judgments.'" Ibid. (quoting Strickland, supra, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695). "[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." State v. Porter, 216 N.J. 343, 353 (2013) (alteration in original) (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999)).

Defendant pointed to no specific instances where counsel's performance during pretrial motions or at trial was not reasonable



by an objective standard. Defendant continues to argue that he did not participate in the robbery or kidnapping despite our affirmance of his convictions. He speculates that had trial counsel been able to contact the 9-1-1 callers that this might "shed light on the actual events that occurred on March 13, 2005." However, the police were not able to contact these callers nor was there any indication that if contacted they would support defendant's version. Under these circumstances, the PCR court properly rejected defendant's claim that trial counsel erred by not contacting these callers.

Defendant contends his trial counsel was ineffective for failing to object to a certain portion of the jury charge. Specifically, while reviewing the verdict sheet for the robbery charge, the court instructed:

In this case, the State alleges that the defendants were armed with a handgun. You must determine if this object qualifies as a deadly weapon and if the State has proven beyond a reasonable doubt that the defendants, either or both of them, used it in the course of committing this robbery.

Defendant takes issue with the judge's use of the word "this" in reference to the robbery, rather than "alleged," arguing that the "charge was misleading because it relieved the State of its burden of proving that he committed the robbery beyond a reasonable doubt."

"Clear and correct jury charges are essential to a fair trial, and the failure to provide them may constitute plain error." State v. Viera, 346 N.J. Super. 198, 210 (App. Div. 2001) (citing State v. Robinson, 165 N.J. 32, 40 (2000)), certif. denied, 174 N.J. 38 (2002). However, "[t]he alleged error [in the instructions] is viewed in the totality of the entire charge, not in isolation." State v. Nero, 195 N.J. 397, 407 (2008) (quoting State v. Chapland, 187 N.J. 275, 288-89 (2006)).

Because defendant failed to raise the issue about the jury instruction on direct appeal, he is barred from raising it now. See R. 3:22-4. However, we also are satisfied that defendant was not deprived of effective assistance of counsel in light of the totality of the charge that thoroughly instructed the jury on the appropriate burden of proof and the elements for each of the counts on which defendant was convicted.

Defendant claims that his trial counsel was ineffective for advising him not to testify. Defendant argues that "his testimony would have provided the jury with much needed pieces of the puzzle."

"The right to testify on one's behalf at a criminal trial has sources in several provisions of the Constitution[,]" Rock v. Arkansas, 483 U.S. 44, 51, 107 S. Ct. 2704, 2708-09, 97 L. Ed. 2d 37, 46 (1987), and is "essential to due process of law in a fair

adversary process." Ibid. (quoting Faretta v. California, 422 U.S. 806, 819 n.15, 95 S. Ct. 2525, 2533 n.15, 45 L. Ed. 2d 562, 572 n.15 (1975)). However, the court's review of counsel's tactical decision of which witnesses to call "should be 'highly deferential.'" State v. Arthur, 184 N.J. 307, 321 (2005) (quoting Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694).


We discern no error in rejecting this claim. Defendant had prior convictions that would have been admissible on cross-examination to attack his credibility pursuant to N.J.R.E. 609. Moreover, his testimony as proffered in his PCR petition would plainly have placed him at the scene of the robbery, which admission was avoided by the strategy taken at trial. Defendant cannot show that the outcome would have been different had he testified. See Strickland, supra, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698.

Finally, defendant's new claim that both his appellate and PCR counsel were ineffective does not warrant relief. "Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012) (citations omitted). However, even were we to consider this claim, defendant failed to make any specific allegations of ineffectiveness, warranting its rejection.

Having failed to demonstrate prima facie evidence of ineffective assistance, the PCR court correctly concluded an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 452, 462-63 (1992).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION