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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2520-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT RAYMOND CARMAN, JR.,
a/k/a ROBERT R. CARMAN, JR.,
BOBBY CARMEN and ROBERT R. CARMEN, JR.,

Defendant-Appellant.

Submitted March 20, 2018 – Decided May 1, 2018

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey,
Law Division, Somerset County, Indictment No.
03-11-0727.

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

Michael H. Robertson, Somerset County
Prosecutor, attorney for respondent (Perry
Farhat, Assistant Prosecutor, of counsel and
on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals from an order entered by the Law Division on August 11, 2016, which denied his petition for post-conviction relief (PCR), and an order entered on September 30, 2016, denying his motion for reconsideration. We affirm.

I.

A Somerset County grand jury charged defendant with first-degree murder of J.B., contrary to N.J.S.A. 2C:11-3.¹ Thereafter, defendant was tried before a jury. At the trial, evidence was presented that J.B. lived in Manville with her mother and two sisters. J.B. was twenty-three-years-old at the time. On Saturday afternoon, October 11, 2003, J.B. left her home. She was wearing black pants, a maroon blouse, a gray hooded sweatshirt, and white sneakers.

At around 2:00 p.m., J.B. went to a pub in Manville, where she saw L.F., defendant's half-brother. J.B. and L.F. had something to eat and drank a few beers. Afterwards, they went with L.F.'s friends to another bar in Bound Brook. The group purchased beer and proceeded to a local river to go "four wheeling" with their trucks. Thereafter, J.B. and L.F. went to L.F.'s apartment.

That evening, J.B. and L.F. returned to the pub in Manville. J.B.'s sister, J.B.'s best friend H.E., and defendant were also

¹ In this opinion, we use initials to identify the victim and several witnesses to protect their identities.

at the pub. Defendant is H.E.'s ex-boyfriend. While at the pub, defendant grabbed J.B. and her sister's breasts, apparently in a joking manner. They told him to stop and he complied. At some point, H.E. noticed that J.B. was not in the pub.

Defendant told H.E. he gave J.B. \$25 to go buy him some crack cocaine, and she had gone to the residence of D.S., a local drug dealer. H.E. remained at the pub until about 1:30 a.m., when she left with J.B.'s sister. H.E. said she was going to D.S.'s residence, and she asked defendant and L.F. to meet her there so they could ride back to the river together.

At D.S.'s home, H.E. found J.B. with D.S., who was "cooking" crack. J.B. told her the drugs were not ready, and H.E. went outside to wait for defendant and L.F. They arrived a short while later, and H.E. informed defendant he would have to wait for the drugs. Defendant said he wanted to get his money back and leave. H.E. went inside the home and took the money. D.S. became angry and refused to give J.B. any drugs.

H.E. left, and J.B. followed her outside. J.B. and defendant were upset because the drug deal had fallen through. H.E. said she no longer wanted to go down to the river, and she asked L.F. to drive her home. As they drove away, H.E. saw J.B. and defendant leave together. Sometime later that evening, J.B. returned to

D.S.'s house and again attempted to purchase drugs. He turned her away.

A bartender at the pub in Manville testified that after he closed the bar, he was driving home with a co-worker. At around 2:45 a.m., he observed J.B. and defendant together on the street near a pay phone. J.B.'s sister testified that she knew J.B. had returned home because around 3:30 a.m., there was a light on in J.B.'s bedroom. J.B. apparently changed her clothes. Her black pants and maroon blouse were in her room, and her pink pants and grey sweatshirt were missing.

The night manager of a Quick Chek on Main Street in Manville said that around 3:30 a.m., J.B. and a male companion entered the store. In addition, a surveillance recording from a camera at a Dunkin' Donuts in the area showed J.B. and a man believed to be defendant in the parking lot. The recording indicated that it was recorded at 4:11 a.m. to 4:14 a.m.² On the video recording, J.B. is seen wearing pink pants and her grey sweatshirt. J.B. returned to the Quick Chek around 4:30 a.m. to make a phone call.

At sometime between 4:00 a.m. and 5:00 a.m., a man delivering newspapers in town saw J.B. at a phone booth. He knew J.B. and

² Sometime after the trial, evidence was presented that the clock on the surveillance camera was about fifteen minutes fast, thereby placing the time of the recording at between 3:57 a.m. and 4:00 a.m.

they had a brief conversation. The deliveryman said J.B. was with a man whom he had seen before but did not know. In addition, a drug dealer who knew J.B. said she had called him several times that day seeking to purchase cocaine. Her last call was at around 4:30 a.m. He refused to sell her drugs.

R.P., a resident of Manville, testified that he lived along the train tracks near the river, and often heard people congregating near the river in the woods. He said that in the early morning of October 12, 2003, he heard the voices of three people arguing. Two of the voices seemed to be female. R.P. stated that the argument continued for about five to ten minutes.

Just before daybreak on October 12, 2003, the engineer of a freight train traveling through Manville noticed what he thought was a body on the tracks. He applied the brakes but could not stop. The train struck the body, which was later identified as J.B.'s body. The police were called at approximately 6:30 a.m.

J.B.'s body was severed at the waist, and the upper portion of her torso was beneath the train. J.B.'s right forearm was found a few feet away, and the middle finger of the right hand was missing. The lower portion of the torso was on the tracks. It was nude, except for a blue sock on the right foot. The matching sock was found fifteen to twenty feet away. J.B.'s pink pants, which were turned inside out, were found about five feet away.

The police also found a cell phone, later identified as J.B.'s phone, on the ground near the tracks. A trail of blood extended from the phone to the body under the train. Near the tracks, the police recovered a beam of wood, about the size of a four-by-four. It was stained with blood, which was later determined to be J.B.'s blood.

Sometime between 6:00 a.m. and 8:00 a.m., one of defendant's male acquaintances was driving through town and saw a water main break near the location where J.B.'s body was found. The man also saw police vehicles near a recreation building. He stopped to tell the officers about the water main break. An officer told the man to stay clear of the area because a body had been found near the railroad tracks.

The man drove on and passed defendant, who was walking on the street, and defendant flagged him down. Defendant asked what was going on down by the railroad tracks. The man thought defendant's question was "odd" because from where defendant was standing, there was no way he could see what was going on down by the railroad tracks. The man did not observe any blood on defendant's clothing.

The police obtained a search warrant for defendant's home and person. The police examined and photographed his body. They noticed that defendant had redness and abrasions on his upper back, chest,

and stomach. The officers confiscated defendant's boots, one of which had blood on the sole. Test results showed that the blood was J.B.'s blood.

An autopsy was performed on October 13, 2013. It was determined that the manner of death was homicide, and the cause of death was multiple blunt traumatic injuries, dismemberment, and traumatic amputation. The autopsy revealed that J.B.'s lower jaw was fractured, and there were tears inside her lip and mouth. Her nose and left cheekbone were broken. There were abrasions, scrapes, and lacerations on her face. It was determined that the injuries to the face and neck were inflicted before J.B.'s death, and were consistent with being struck and beaten with a wooden board.

An inmate with whom defendant had been incarcerated testified that defendant told him he killed J.B. by striking her with a piece of wood. According to the inmate, defendant said he had just broken up with his girlfriend, his "life was going downhill," and he just "snapped."

The jury found defendant guilty of first-degree murder, and the trial court sentenced him to an extended term of thirty-five years to life, subject to an eighty-five percent period of parole ineligibility, pursuant to N.J.S.A. 2C:43-7.2. Defendant appealed from the judgment of conviction dated August 13, 2007. We affirmed his conviction. State v. Carman, No. A-2434-07 (App. Div. Dec. 10,

2009). The Supreme Court denied defendant's petition for certification. State v. Carman, 201 N.J. 441 (2010).

II.

Defendant thereafter filed a pro se PCR petition, alleging the ineffective assistance of trial counsel. The court assigned counsel to represent defendant, and PCR counsel filed an amended petition and brief, arguing that defendant's trial attorney was ineffective because he failed to: (1) file a motion to have certain evidence found at J.B.'s home submitted for further examination; (2) investigate the case and call witnesses who would have supported the defense theory of the case; (3) raise an apparent discrepancy regarding the time shown on the Dunkin' Donuts surveillance recording; (4) argue more comprehensively issues under State v. Sands, 76 N.J. 127 (1978), and State v. Brunson, 132 N.J. 377 (1993); and (5) seek an adjournment of the trial based on defendant's health issues. PCR counsel further argued that the cumulative effect of trial counsel's errors constituted the ineffective assistance of counsel.

The PCR court heard argument and denied the petition without conducting an evidentiary hearing. Defendant appealed. We reversed the order denying PCR and remanded the matter for an evidentiary hearing, limited to the issue of defendant's alibi claim. State v. Carman, No. A-2669-12 (App. Div. Jan. 2, 2015) (slip op. at 17-

18). Defendant then filed a petition for certification, which the Supreme Court denied. State v. Carman, 221 N.J. 492 (2015).

On remand, the PCR judge conducted an evidentiary hearing. At the hearing, the judge heard testimony from Joan Carman, defendant's mother; the engineer of the train that struck J.B.'s body; defendant's trial attorney; and the investigator for the defense.

Thereafter, the PCR judge filed a written opinion finding that defense counsel and the investigator made every reasonable effort to locate Mrs. Carman so that she could testify at trial, but she had "mysteriously" absented herself from New Jersey and remained incommunicado. The judge noted that Mrs. Carman had moved to Florida a short time before the trial, and she failed to inform defense counsel of her whereabouts.

The judge also found that defense counsel had legitimate strategic concerns about calling Mrs. Carman as a witness. At the remand hearing, defense counsel testified he was concerned her testimony would be challenged as biased, and that she may have tampered with evidence by laundering defendant's clothing. The judge found that defendant's trial attorney had thoroughly investigated the matter and would have made an appropriate tactical decision not to call Mrs. Carman as a witness if she had been available.

The judge entered an order dated August 11, 2016, denying PCR. Defendant then filed a motion for reconsideration. In support of his motion, defendant submitted additional evidence, including an affidavit stating the court's file did not include a notice of alibi. According to defendant, this showed that his trial attorney never served a notice of alibi on the prosecutor.

The judge filed an order dated September 30, 2016, denying the motion. In that order, the judge wrote:

The [c]ourt observed Mrs. Carman, the [d]efendant's mother, testify at the [p]lenary [h]earing in August and found her incredible. She had [a] motive to prevaricate, her demeanor was bizzare, her testimony was vague and inconsistent. She was missing and incommunicado at the time of [d]efendant's trial so that [d]efendant's trial attorney could not call her even if he wanted to. There were issues involving her participating in the spoliation of evidence. That, coupled with her performance on the witness stand before this [c]ourt at the . . . [PCR] hearing, would have persuaded even the most inept criminal defense attorney not to call her as a witness at trial. The fact that the [c]ourt's file does not contain a [n]otice of [a]libi is not dispositive of the proposition that none was served on the prosecutor at the time. There are, also, other explanations as to why that document cannot be found in 2016, when it could have been in the file [thirteen] years prior in 2003.

This appeal followed. Defendant's PCR counsel has filed a brief in support of the appeal. In addition, defendant has filed a pro se supplemental brief.

III.

On appeal, defendant argues that his conviction must be reversed because he was denied the effective assistance of trial counsel. He contends his trial attorney erred by failing to locate Mrs. Carman and have her testify. He contends her testimony would have supported an alibi defense.

Where, as in this case, the PCR court conducts an evidentiary hearing on the petition, we will defer to the court's findings of fact based on live-witness testimony if the court's findings are "supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013). Our deference to the court's factual findings is especially appropriate when its findings are "substantially influenced by [the court's] opportunity to hear and see the witnesses." Ibid. (quoting State v. Elders, 192 N.J. 224, 244 (2007)).

In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-part test established by Strickland v. Washington, 466 U.S. 668, 686 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). Under Strickland, a defendant must show that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687.

Counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." Id. at 688.

A defendant also must show that counsel's "deficient performance prejudiced the defense." Id. at 687. The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome" of the proceeding. Ibid.

Moreover, "[i]n addressing an ineffective assistance [of counsel] claim based on a counsel's failure to call an absent witness, a PCR court must unavoidably consider whether the absent witness's testimony would address a significant fact in a case, and assess the absent witness's credibility." State v. L.A., 433 N.J. Super. 1, 15 (App. Div. 2013). "However, the assessment of an absent witness's credibility is not an end in itself." Ibid. "Rather, it is a factor in the court's determination whether there is a reasonable probability that, but for the attorney's failure to call the witness, the result would have been different – that is, there would have been reasonable doubt about the defendant's guilt." Id. at 15-16.

When the court considers the impact an absent witness may have, the "court should consider: '(1) the credibility of all

witnesses, including the likely impeachment of the uncalled defense witnesses; (2) the interplay of the uncalled witnesses with the actual defense witnesses called; and (3) the strength of the evidence actually presented by the prosecution.'" Id. at 16-17 (quoting McCauley-Bey v. Delo, 97 F.3d 1104, 1106 (8th Cir. 1996)). "All three factors derive from the court's obligation under Strickland to consider the totality of the evidence in making its prejudice determination." Id. at 17.

Defendant argues that the testimony presented at the remand hearing does not support the PCR court's finding that defendant's attorney was not deficient in failing to call Mrs. Carman as a witness. We disagree.

The testimony showed that shortly before defendant's trial began, Mrs. Carman moved to Florida. She claimed she had contacted defendant's trial attorney or his office and said she was moving. Mrs. Carman conceded that she did not provide counsel or the investigator with her address in Florida. She stated that her other son Brian was still living in her house, and she assumed he would send her "anything important." She testified that she did not have any mail forwarded to her from New Jersey, other than social security benefits.

Defendant's trial attorney testified, however, that Mrs. Carman "basically disappeared" a few weeks or a month before the

trial. He said her action was "bizarre" and "just made no sense." The attorney denied receiving any call from Mrs. Carman indicating she was moving. In addition, the defense investigator stated that Mrs. Carman never told him she was moving, and she did not provide him with a Florida mailing address.

The investigator testified that he went to her house and spoke with her son Brian, but he was not able to provide the investigator with any information about Mrs. Carman's whereabouts. Brian also told the investigator he did not have a phone number for his mother. Furthermore, the notes the investigator prepared of his conversation with Brian indicate he did not know if his mother was going to return for defendant's trial.

Thus, there is sufficient credible evidence in the record to support the judge's finding that defense counsel and the defense investigator exercised due diligence in attempting to locate Mrs. Carman so that she could be called as a witness at defendant's trial. The record supports the judge's finding that shortly before the trial, Mrs. Carman moved to Florida and failed to provide defense counsel and the investigator with contact information. As the judge determined, she had essentially gone into hiding.

Defendant further argues that the record does not support the PCR judge's finding that defendant's attorney had sufficient strategic reasons for not calling Mrs. Carman as a witness, even

if she could be located. Again, we disagree. The record shows that Mrs. Carman's testimony could have been challenged for bias because she is defendant's mother.

Moreover, Mrs. Carman told the investigator that the clothes defendant had been wearing the night J.B. was killed were "spotless." However, the record shows that blood was found on defendant's boot, which was later determined to be J.B.'s blood. The presence of blood on one of defendant's boots suggested that Mrs. Carman may have laundered defendant's clothes to destroy evidence.

In addition, Mrs. Carman made inconsistent statements about the time she recalled first seeing defendant in the morning of October 12, 2003. At the PCR hearing, Mrs. Carman testified that she generally awakens at 5:00 a.m., and she probably saw defendant between 5:00 a.m. and 5:15 a.m. However, in 2011, when interviewed by the defense investigator, Mrs. Carman said she saw defendant at either 5:30 a.m. or 6:00 a.m. Furthermore, the investigator's report from December 2004 states that Mrs. Carman reported to him that she saw defendant at 6:00 a.m.

Mrs. Carman also was unable to provide a clear statement as to when defendant returned home in the early morning of October 12, 2003. She testified that she usually knows when defendant returns home late at night. She explained that he has a bad habit

of slamming doors, especially after he had been drinking. Mrs. Carman said that at these times, defendant usually slams the porch door, the kitchen door, and his bedroom door. The dog would hear the noise, bark, and Mrs. Carman would wake up. Mrs. Carman testified that she did not hear the doors slam or the dog bark in the early morning of October 12, 2003.

Thus, defense counsel had sound strategic reasons for not calling Mrs. Carman as a witness. Her testimony would have been challenged because she was biased and gave inconsistent statements about when she first saw defendant on the morning of October 12, 2003. Moreover, and most importantly, counsel had reason to believe Mrs. Carman had destroyed evidence that would have been damaging to her son.

Defendant further argues that the result of the trial would have been different if Mrs. Carman had testified for the defense. He contends her credibility was "virtually unassailable." However, as the PCR judge found, her testimony was inconsistent on several key points. The judge also noted in his order denying reconsideration that Mrs. Carman's demeanor was bizarre, she had a motive to prevaricate, and her testimony was "vague and inconsistent."

Defendant argues, however, that Mrs. Carman's testimony was consistent with the testimony of another witness, who claimed he

saw J.B. with a man in the early morning of October 12, 2003. That witness stated that the man was about five feet, five or six inches tall, whereas defendant is much taller. The evidence shows that the witness observed the man while sitting down, which may account for the discrepancy.

Mrs. Carman also could not account for defendant's whereabouts at any time prior to 5:15 a.m. or 5:30 a.m. Witnesses testified that defendant and J.B. were together during the evening she was killed. The Dunkin' Donuts surveillance video shows J.B. with defendant at around 4:00 a.m. A drug dealer said she called him about 4:30 a.m. Her body was struck by the train at daybreak. Mrs. Carman's testimony would not have provided a solid alibi.

Furthermore, when the police searched defendant's home and his person, they found redness and abrasions on his body, and blood on one of his boots. In addition, in 2006, while in jail, defendant told another inmate that he killed J.B. by hitting her with a piece of wood.

In sum, defendant failed to show that if Mrs. Carman had testified at trial, it was reasonably probable the result here would have been different. Her testimony would not have raised a reasonable doubt as to whether defendant murdered J.B. during the early morning hours of October 12, 2003.

As noted previously, defendant has filed a pro se supplemental brief. He argues that trial counsel was inexcusably negligent because he failed to locate and present testimony from his mother. He claims Mrs. Carman was easily accessible. He further argues that the State has erroneously focused on "minor inconsistencies" in his mother's testimony. He notes that she is a seventy-three-year-old senior citizen. He argues he was prejudiced by counsel's failure to present alibi evidence, and his conviction should be reversed.

The arguments presented in defendant's pro se supplemental brief lack sufficient merit to warrant discussion. R. 2:11-3(e)(2). The record fully supports the PCR court's determination that defendant failed to satisfy the Strickland test for ineffective assistance of counsel with regard to his purported alibi defense.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION