RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0525-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.I.L.,[1]

Defendant-Appellant.

Submitted March 3, 2022 – Decided May 17, 2022

Before Judges Haas, Mawla and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 14-09-0780.

Joseph E. Krakora, Public Defender, attorney for appellant (Karen A. Lodeserto, Designated Counsel, on the brief).

William A. Daniel, Union County Prosecutor, attorney for respondent (Meredith L. Balo, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

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[1] We use initials to avoid the disclosure of the parties' identities. R. 1:38-3(d).

PER CURIAM

Defendant J.I.L. appeals from the May 28, 2020 denial of his petition for post-conviction relief (PCR). We affirm.

A jury convicted defendant of first-degree aggravated assault, N.J.S.A. 2C:14-2(a)(1), second-degree sexual assault, N.J.S.A. 2C:14-2(b), and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). The jury acquitted defendant of a separate first-degree aggravated sexual assault involving the same victim. After merger, on February 10, 2017, the judge sentenced defendant on the first-degree aggravated sexual assault to nineteen years' imprisonment subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and nine years' consecutive imprisonment on the child endangering charge. Other counts of the indictment involving a different victim were dismissed by the State the day of sentencing.

Defendant's direct appeal was denied December 3, 2018, and the Supreme Court denied certification. State v. J.I.L., No. A-3155-16 (App. Div. Dec. 3, 2018), certif. denied, 238 N.J. 369 (2019). Defendant's PCR petition was filed July 19, 2019.

We describe only those portions of the trial record relevant to this appeal. The indictment charged defendant with molesting his step-daughter, I.C., on

multiple occasions while she was between six and eight years old. When she testified, she was eleven years old.

After the child disclosed the sexual assaults, she was interviewed by the Morris County Prosecutor's Office. On videotape, she said defendant "was humping [her] . . . on [her] back" and "[i]nside [her] butt." She also said "it" would move "a lot of times," adding that sometimes something would happen that would make her feel weird when he was doing this.

I.C.'s mother testified the Prosecutor's Office asked her to bring in some of her child's unwashed clothing. She explained that she took the dirty clothes from the child's bedroom hamper. Those clothes had not been washed when she turned them over to the Prosecutor's Office. She always washed her daughter's clothing separately.

The State's expert, qualified in the field of child sexual abuse, testified the victim's examination revealed no signs of physical injury. The expert said that the examination remained consistent with I.C.'s disclosures, however, because prepubescent children heal rapidly, and any injury to I.C.'s body or sexual organs would heal quickly. On cross-examination, the expert acknowledged the examination was also consistent with a child who was not sexually abused, and

that she could not tell the jury beyond a reasonable doubt that the child was sexually abused.

The State's expert in the field of DNA extraction found traces of defendant's semen on I.C.'s underwear. That expert acknowledged that semen can transfer between articles of clothing in a washing machine.

At a pretrial conference, the judge reviewed a list of items counsel had agreed to off-the-record, including that "defendant will listen to the sidebar of jury selection via headset. There will be no access to sidebar by the defendant as the trial progresses." Once the trial began, defendant's interpreter initially attempted to listen to sidebars, but the court instructed her not to do so in the future, as sidebars included only counsel and the judge. Defendant made no objection. The issues addressed at the sidebars included hearsay objections to the Division of Child Protection and Permanency (DCPP) records, the phrasing of a question posed to the Prosecutor's Office detective regarding whether transfer of semen can occur when clothing is washed, and whether counsel could continue asking the child about the temperature on a day when she met with the prosecutor in order to "jog her memory." In closing, defense counsel contended that the absence of any victim testimony regarding pain meant she was not

penetrated, a statutory element which elevates sexual assault of a child under thirteen to an aggravated first-degree crime. See N.J.S.A. 2C:14-2(a)(1).

In support of his PCR petition, defendant certified "[a]t no time during the sidebar discussions did my attorney at the time or afterwards inform me about the content . . . ." He also claimed had he known about his "right to hear sidebar discussions, [he] would not have waived that right." Thus, defendant argued trial counsel was ineffective for failing to object to the trial court's ruling that he was not entitled to hear sidebar discussions, and that his appellate counsel was ineffective by failing to raise the issue on direct appeal. Defendant's PCR counsel also argued that trial counsel had been ineffective for failing to refute the child abuse expert's testimony, which might have been viewed by the jury as bolstering the child's claims. PCR counsel asserted nothing in the record suggested that trial counsel consulted with any forensic expert in preparation for trial.

When Judge John M. Deitch denied the PCR petition, he noted that defense counsel had actually agreed on the record and in defendant's presence that defendant would not participate in sidebar conferences during the trial. He further noted that defendant had access to the trial transcripts for years, yet could not identify even one sidebar in which defendant's participation would have

affected the outcome. In fact, defendant did not even identify sidebars of particular importance to the trial process. He considered defendant's alleged prejudice from failure to participate in sidebar conferences nothing more than bald, conclusory assertions. The judge found counsel's agreement with regard to sidebar conferences during trial did not satisfy the Strickland[2] standard. Counsel did not perform below the level of professional competence, nor did the representation prejudice the outcome. The judge reached the same conclusion with regard to appellate counsel.

The judge also found that defendant's claims regarding trial counsel's failure to consult with forensic experts lacked merit. Defendant made unsupported arguments regarding potential challenges to the DNA proofs and the expert's testimony that children heal quickly. Judge Deitch viewed the latter challenge as baseless because the child testified that the penetration was slight. Given the victim's testimony, the judge found counsel's failure to retain an expert did not meet the Strickland standard.

Now on appeal, defendant raises the following three points:

> POINT I
>
> THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR POST-

[2] Strickland v. Washington, 466 U.S. 668, 687 (1984).

CONVICTION RELIEF WITHOUT GRANTING AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM TRIAL COUNSEL REGARDING HIS FAILURE TO OBJECT TO [DEFENDANT] BEING DENIED PARTICIPATION IN SIDEBAR CONFERENCES DURING TRIAL.

POINT II

THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR POST-CONVICTION RELIEF WITHOUT GRANTING AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM APPELLATE COUNSEL REGARDING HIS FAILURE TO RAISE ON DIRECT APPEAL THAT [DEFENDANT'S] PRECLUSION FROM SIDEBAR CONFERENCES WAS PREJUDICIAL ERROR.

Defendant raises the following point in his pro se supplemental brief:

THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR POST[-] CONVICTION RELIEF WITHOUT GRANTING AN EVIDENTIARY HEARING DURING THE RECONSIDERATION OF DECISION HEARING AS EXPERT TESTIMONY WAS NEEDED TO VERIFY THAT [THE EXPERT]'S OPINED "ACCELERATED HEALING" THEORY IS A NET OPINION.

[a]. When Expert Testimony is Required.

[b]. [The expert's] "Accelerated Healing" Theory is a Net Opinion and Should [H]ave [B]een Ruled [I]nadmissible.

I.

Appellate courts "review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion." State v. Peoples, 446 N.J. Super. 245, 255 (App. Div. 2016) (citing State v. Preciose, 129 N.J. 451, 462 (1992)). However, because the PCR court did not hold an evidentiary hearing, "we may exercise de novo review over the factual inferences the trial court has drawn from the documentary record." State v. Lawrence, 463 N.J. Super. 518, 522 (App. Div. 2020) (quoting State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014)). We also "review de novo the PCR court's conclusions of law." State v. L.G.-M., 462 N.J. Super. 357, 365 (App. Div. 2020) (citing State v. Nash, 212 N.J. 518, 541 (2013)).

Pursuant to Rule 3:22-10(b), a defendant is entitled to a PCR hearing on a claim of ineffective assistance of counsel only when a prima facie case has been established. Such hearings are not granted where:

> (1) . . . an evidentiary hearing will not aid the court's analysis of the defendant's entitlement to post-conviction relief;
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> (2) . . . the defendant's allegations are too vague, conclusory or speculative; or
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> (3) . . . the [only] purpose [would be to] permit[] a defendant to investigate whether additional claims for relief exist for which defendant has not demonstrated a

> reasonable likelihood of success as required by [Rule] 3:22-10(b).
>
> [R. 3:22-10(e).]

To establish a prima facie claim of ineffective assistance of counsel, a defendant must show that defense counsel's objectively deficient performance prejudiced him by rendering his trial unfair and the outcome unreliable. Strickland, 466 U.S. at 687; see State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland standard). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Attorney conduct is measured by its "reasonableness under prevailing professional norms." Id. at 688. And to prove prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Fritz, 105 N.J. at 60-61 (quoting Strickland, 466 U.S. at 694).

II.

A defendant's right to be present during sidebar conferences "is not absolute." State v. W.A., 184 N.J. 45, 48 (2005). "The majority of federal courts that have specifically addressed the sidebar presence issue are aligned with the view that failure to assert the right constitutes a waiver." Id. at 62. So too, in New Jersey "a defendant who does not affirmatively request the right to participate in voir dire sidebars should be considered to have waived the right[.]" Id. at 63. A defendant can expressly or impliedly waive the right to presence at trial. R. 3:16(b).

In W.A., the judge did not even allow the defendant to listen to sidebar discussions with potential jurors during voir dire. 184 N.J. at 49-52. The Court reasoned:

> Although interrelated, the two classes of challenge are actually quite distinct. Because the challenge for cause involves proof of legally cognizable grounds, it can be fairly characterized as within the attorney's field of expertise. On the contrary, it is the defendant himself who plays the critical role in exercising the peremptory challenge.
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> [Id. at 54.]

Additionally, the Court determined that a defendant's improper exclusion from sidebar "is subject to a harmless error analysis." Id. at 64.

In this case, defendant's counsel silently assented to defendant's exclusion from sidebars during trial. Defendant's argument that he could not have knowingly waived that right since he did not know it existed is unconvincing. Having participated in sidebars during jury selection, it would seem reasonable for him to have believed he could participate in sidebars during the trial. Be that as it may, defendant also describes the sidebars as addressing "significant issues such as admission of DCPP records, DNA evidence, . . . penetration," and victim testimony, yet does not identify the manner in which his participation would have strengthened his defense. While the sidebars certainly included discussions on issues of law, beyond the ministerial, defendant does not explain how his participation in these matters would have advanced his cause.

Furthermore, the judge conducted a fairly extensive on-the-record voir dire conference, during which he systematically reviewed matters ranging from the number of challenges available to the parties to defendant's manner of dress when the trial began. At that time, he explicitly stated that defendant would listen to sidebars of jury selection, but not as the trial progressed. Defense counsel's silence as the judge reviewed the detailed checklist suggests that he agreed to the procedure off the record, even if he did not explicitly do so on the record.

Furthermore, W.A. does not support defendant's position because these were sidebars regarding trial issues. Defendants ordinarily know about the substantive content of sidebars because objections are made, and issues are raised, in open court in the presence of all parties. Only then does the court direct the attorneys to resolve the matter at sidebar. If defendant had questions about any of these sidebars, he could have asked counsel, even if he was not included via headset.

Jury voir dire sidebars, in contrast, are the only opportunity for judges, counsel, and prospective jurors to discuss important individualized questions regarding a juror's ability to serve. The use of headsets allowing defendants to listen affords prospective jurors privacy while enabling a defendant to hear every word said, and the tone in which it is spoken. Jury selection, unlike the more academic issues of evidence and mode of interrogation, is a crucial arena in which a defendant can meaningfully participate.

In any event, W.A. dealt with voir dire sidebar discussions. And even in that context, the issue is subject to harmless error analysis. See W.A. 184 N.J. at 64. The Court distinguished between trial sidebars, "within the attorney's field of expertise[,]" and voir dire sidebars where a defendant plays a critical role in exercising peremptory challenges. Id. at 54.

As the trial judge observed, defendant failed to identify any specific sidebars during which his familiarity with the issues might have aided his cause. Thus, it is entirely speculative to suggest that his participation would have influenced the outcome. It is unlikely that he was unaware of the issues being discussed.

Appellate counsel's failure to raise the issue on appeal is of no moment. If trial counsel was not ineffective in the manner in which he agreed to proceed with the trial, certainly appellate counsel was not ineffective for having failed to raise a non-issue. The contention does not establish a prima facie case.

III.

Defendant argues that "an expert witness was essential to his legal defense" in order to rebuff the State's child abuse expert's accelerated healing theory and to clarify I.C.'s testimony about "a little bit" of penetration. Therefore, an "evidentiary hearing was . . . essential . . . to present expert testimony" to aid Judge Deitch. His pro se supplemental brief thoroughly describes the law surrounding admissibility of expert testimony. But such law is irrelevant to the question of whether defense counsel performed deficiently by choosing not to retain an expert to refute the expert testimony.

Defendant also points to a perceived inconsistency in I.C.'s testimony—namely, I.C. testified both that defendant penetrated her only "a little bit" and that the "his private part . . . was going in and out a lot of times." According to defendant, only a medical expert of his own could properly confirm or reject the State's expert's assertion that I.C.'s "normal" physical exam could be consistent with frequent penetration.

Defendant goes on to cast the expert's testimony that puberty accelerates healing as a "net opinion." He also argues the expert did not "concede" that I.C.'s physical exam "was also consistent with someone who was not sexually assaulted." Defendant vaguely and speculatively argues the expert's testimony "is not based on a sound, adequately-founded scientific methodology . . . ." He also fixates on her use of the word "possibility," arguing her opinion cannot be within a reasonable degree of medical certainty if she used such probabilistic language.

Expert testimony is admissible if it "will assist the trier of fact to understand the evidence or determine a fact in issue[.]" N.J.R.E. 702. Expert testimony must be based on "(1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied

upon by experts." Townsend v. Pierre, 221 N.J. 36, 53 (2015) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)). "An expert may not provide an opinion at trial that constitutes 'mere net opinion.'" Matter of Civ. Commitment of A.Y., 458 N.J. Super. 147, 169 (App. Div. 2019) (quoting Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014)). Under the net opinion rule, expert conclusions are admissible only if "supported by factual evidence or other data." Ibid. (quoting Townsend, 221 N.J. 53-54). Experts cannot offer "mere conclusion[s]." Ibid.

"The net opinion rule does not require experts to organize or support their opinions in a specific manner 'that opposing counsel deems preferable.'" Ibid. (quoting Townsend, 221 N.J. at 54). An expert's opinion is not rendered a net opinion simply on the basis that "it fails to account for some particular condition or fact which the adversary considers relevant" so long as the expert "otherwise offers sufficient reasons which logically support [her] opinion." Ibid. (quoting Townsend, 221 N.J. at 54). But experts must demonstrate scientifically reliable methodologies and factual bases for their opinions. Id. at 170.

Therefore, defendant's claim lacks merit. It is self-evident that if defendant penetrated the victim's body "just a little bit," he could have caused no injury at all. An expert is not necessary to challenge that statement. Further,

defendant's attorney successfully elicited testimony on cross-examination that the physical exam in this case did not prove beyond a reasonable doubt that defendant had sexually assaulted the child.

Additionally, defendant's analysis of the opinion as a net opinion is fatally flawed. The expert was qualified. She offered the reasons for her conclusions based on her expertise and examination of the victim. By eliciting the statement from the expert that the physical exam could be consistent with a child who had not been sexually abused, counsel did everything that could have been accomplished with that witness. Cf. Townsend, 221 N.J. at 57-58 (holding engineering expert offered net opinion as to causation of fatal accident where expert diverged from the evidence, did not apply his expertise to empirical data, and did not even take basic measurements).

Affirmed.