

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-1705-20
A-2179-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARCAL N. CAMPBELL,
a/k/a MARCAL CAMPBELL,
MARCEL N. CAMPBELL,
and CALDIGGIE N. CAMPBELL,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWARD D. WOODSON,
a/k/a EDWARD DARNELL
WOODSON, and DARNELL
WOODSON,

Defendant-Appellant.

Submitted October 12, 2022 – Decided November 14, 2022

Before Judges Accurso, Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 11-08-0888.

Joseph E. Krakora, Public Defender, attorney for appellant Marcal N. Campbell in A-1705-20 (David A. Gies, Designated Counsel, on the briefs).

Joseph E. Krakora, Public Defender, attorney for appellant Edward D. Woodson in A-2179-20 (Steven M. Gilson, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent State of New Jersey in A-1705-20 (Sarah D. Brigham, Deputy Attorney General, of counsel and on the brief).

William A. Daniel, Union County Prosecutor, attorney for respondent State of New Jersey in A-2179-20 (Milton S. Leibowitz, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In these appeals we scheduled back-to-back and consolidate for the purpose of issuing a single opinion, defendants Marcal N. Campbell and Edward D. Woodson challenge orders denying their separate post-conviction relief (PCR) petitions without evidentiary hearings. Unpersuaded by their contentions the PCR courts erred by finding they failed to present sufficient evidence establishing prima facie cases that their respective trial counsel were ineffective

and by denying their petitions without evidentiary hearings, we affirm the challenged orders.

I.

A. Defendants' Trial

A grand jury charged Campbell and Woodson in an indictment with various charges arising out of the kidnapping and sexual assault of S.S., an individual the State claimed is intellectually challenged and incapable of knowingly consenting to any sexual relations.¹ More particularly, the indictment charged Woodson with first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1); first-degree aggravated sexual assault by physical force and coercion, N.J.S.A. 2C:14-2(a)(5); first-degree sexual assault by committing an act of sexual penetration on S.S. knowing she was "mentally defective," N.J.S.A.

¹ To protect the identity of the victim, we identify her and her family members by their initials. See R. 1:38-3(c)(12) (excluding from public access the names and addresses of sexual offense victims). We note that in an apparent overabundance of caution our initial decision on defendants' direct appeals from their convictions referred to defendants by their initials in an effort to protect the victim's identity. State v. M.C., Nos. A-1137-15, A-1148-15 (App. Div. Aug. 3, 2018). Because defendants are not related to the victim and disclosure of their names does not risk identifying the victim or her family members, we refer to defendants by name here. We discern no basis under Rule 1:38-3 to do otherwise.

2C:14:2(a)(7); and second-degree sexual assault by physical coercion, N.J.S.A. 2C:14-2(c)(1).²

The indictment charged Campbell with first-degree aggravated sexual assault by physical force and coercion, N.J.S.A. 2C:14-2(a)(5); first-degree sexual assault by committing an act of sexual penetration on S.S. knowing she was "mentally defective," N.J.S.A. 2C:14:2(a)(7); and second-degree sexual assault by physical coercion, N.J.S.A. 2C:14-2(c)(1).³

At their joint trial on the charges, the evidence showed S.S. is in the moderate to severe range of "mental retardation" and in 2011 resided with her adoptive mother, B.S., and another family member, L.L.⁴ S.S. was diagnosed as

² The charges against Woodson are alleged in counts one, two, four, and six. The indictment also charged Woodson in count eight with fourth-degree witness tampering, N.J.S.A. 2C:28-5(a). The court dismissed that charge prior to trial.

³ The charges against Campbell are alleged in counts three, five, and seven of the indictment.

⁴ In summarizing the evidence presented at defendants' trial, we rely on the recitation of the evidence detailed in our opinion on defendants' direct appeals from their convictions, M.C., Nos. A-1137-15, A-1148-15 (slip op. at 4-12), as well as our independent review of the trial record. As we explained in our opinion on defendants' direct appeals, we "recognize the term 'mental retardation' is disfavored, and that the term 'intellectual disability' is currently accepted in the medical community to 'describe the identical phenomenon.'" Id. at 3-4, n.1 (citation omitted). We use the term "mental retardation" and others, including "mental disability" and "mental defect," to accurately reflect the use

severely handicapped at age five and she attended a school for children with special needs until age twenty-one. S.S. is unable to read, write, cook, hold a job, or use public transportation on her own. In 2009 and 2010, she gave birth to children who were removed from her care. Prior to January 31, 2011, L.L. assisted S.S. with daily hygiene and bathing, and L.L. looked after S.S. when B.S. worked. Following the January 31, 2011 incident that gave rise to the charges in the indictment, S.S. resided in a group home because she is unable to care for herself.

Just prior to January 31, 2011, S.S. joined a church where she met Woodson, who was also a member. On January 31, 2011, L.L. overheard telephone calls between S.S. and Woodson during which Woodson pressured S.S. to attend Bible study at the church that evening. S.S. agreed to go to the Bible study and provided Woodson with her address.

Woodson arrived at S.S.'s home in a van driven by another person. He told B.S. and L.L. he was taking S.S. to Bible study and would bring S.S. home afterwards. B.S. and L.L. allowed S.S. to go and expected her to return that evening.

of those terms by the court, counsel, and witnesses at trial. Ibid. We intend no disrespect to the victim in doing so.

The trial evidence further showed S.S. entered the van and there were two other men in it. About two hours after the van departed from S.S.'s home, the van's driver dropped off S.S. and Woodson at Woodson's home, where they met Campbell, Woodson's brother, and another male, Vaughn Barksdale. At about 2:30 a.m., the four men and S.S. went into the basement of Woodson's home.

At trial, S.S. testified that once in the basement, Woodson removed her clothes, forced her to perform oral sex on him, and vaginally and anally penetrated her with his penis. She testified Campbell did the same things to her. S.S. further explained she told the men to stop, but they did not. According to S.S., when the assaults ended, she fell asleep on a chair and Woodson's sister later arranged for a cab to take her home.

L.L. questioned S.S. when she arrived home dirty, smelling badly, and unusually quiet. S.S. told L.L. what occurred. L.L. called Woodson, who acknowledged putting his penis in S.S.'s mouth but denied having sexual intercourse with S.S. Woodson also asked L.L. not to call the police. L.L., however, then called the police.

S.S. later took the police to Woodson's house and provided a description of him, but she was unable to identify Campbell. L.L. brought S.S. to Muhlenberg Hospital, where a trained Sexual Assault Nurse Examiner (SANE)

conducted an examination and evaluation. The SANE nurse testified her examination revealed injuries to S.S.'s vaginal and anal areas, including a one-quarter inch anal tear.

At trial, the State introduced a video recording of an interview of Woodson by Union County Prosecutor's Office Detective Edward Rivera. During the interview, Woodson said he knew S.S. from church, she had a crush on him, and she asked to perform oral sex on him and have sexual intercourse with him. Woodson admitted picking up S.S. at her home and taking her to his family's home to "hang out." He explained S.S. wanted to kiss him, hug him and "love" him, but he was not attracted to her. Woodson also said S.S. voluntarily performed oral sex on him, but he denied engaging in sexual intercourse with her or forcing her to do anything. He also explained he "didn't notice she had anything wrong mentally."

Detective Rivera and Union County Prosecutor's Office Detective Brian O'Malley also interviewed Campbell. The transcript of Campbell's interview was read to the jury. Campbell said he was on the porch of Woodson's home with Woodson's brother and Barksdale on the evening of January 31, 2011, when Woodson arrived with a woman. He denied entering Woodson's house or engaging in any sexual activity with S.S.

The State presented Monica Ghannam, a forensic scientist employed in the Union County Prosecutor's Office's forensic laboratory, who analyzed vaginal, cervical, and anal swabs taken from S.S. and her underwear during the SANE nurse's examination. Ghannam also analyzed DNA samples from S.S., Woodson, Campbell, and Barksdale.

The court qualified Ghannam as an expert witness in the field of serology and DNA analysis. Ghannam testified: "the mixture of those two individuals [Woodson and Campbell] accounts for all the DNA types that are in the sperm fraction from the anal swabs"; the semen collected from the anal specimen matched both Woodson and Campbell; and the semen from S.S.'s underwear matched Campbell. Barksdale's DNA was not found at a detectable level on any of the samples taken from S.S.

The court also qualified Dr. Louis Schlesinger as an expert in forensic psychology. He evaluated S.S. and opined she was "very pleasant and very friendly" but had "very significant brain damage." Schlesinger explained that S.S. had "no functional academic skills," could not drive, read, or write and did not have a bank account, but she could operate a cell phone. Based on his performance of psychological tests on S.S., Schlesinger determined S.S. is "very, very childlike and regressive," has "very, very low" cognitive

functioning, and an I.Q. of approximately forty-five, placing her in the moderate to severe range of mental retardation.

He also testified S.S. understands the basic mechanics of sex and "knows people don't have the right to force her to have sex," but he concluded she had only a minimal ability to resist engaging in sex and was incapable of exercising her right to refuse to engage in sexual activity on the night of the incident. He testified S.S. "cannot fend off anything" and was "unable to exercise any of her rights not to consent."

On cross-examination, defense counsel challenged Schlesinger's credibility by suggesting he is biased in favor of the State; establishing Schlesinger has only testified twice regarding an intellectually disabled person's ability to consent to sex; and demonstrating Schlesinger did not administer certain tests in evaluating S.S. Moreover, counsel elicited testimony from Schlesinger tending to show S.S. can voluntarily consent to sex; has sexual needs and desires; and has a history of consensual sexual relations.

Woodson presented Barksdale as a witness. Barksdale testified he was on the porch of Woodson's home when a van dropped off Woodson and S.S. He said that he, Woodson, Campbell, and S.S. decided to go into the basement of the home to get warm. Barksdale further testified that once in the basement,

Woodson and Campbell simultaneously engaged in unprotected sexual activity with S.S. for approximately an hour and fifteen minutes. According to Barksdale, S.S. did not cry, scream, or request that Woodson and Campbell stop, and S.S. made statements, such as "It's good. Keep it going." Barksdale denied engaging in sexual activity with S.S., and he testified Woodson invited S.S. upstairs to go to bed, and then he and Campbell left Woodson's home.

Following the presentation of the evidence, the jury convicted Woodson and Campbell of the offenses charged in the indictment. The court later imposed sentence and defendants separately appealed. We scheduled the appeals back-to-back and issued a single decision affirming defendants' convictions. M.C., Nos. A-1137-15, A-1148-15 (slip op. at 53). We vacated defendants' sentences on their convictions for first-degree sexual assault by committing an act of sexual penetration on S.S. knowing she was "mentally defective," N.J.S.A. 2C:14:2(a)(7), and we remanded for resentencing on those charges. Ibid. We affirmed defendants' sentences on the other charges. Ibid. The Supreme Court denied defendants' petitions for certification. State v. M.C., 236 N.J. 625 (2019); State v. M.C., 237 N.J. 164 (2019). The trial court later resentenced defendants, and they did not appeal from their resentencings.

B. Woodson's PCR Petition

In March 2019, Woodson filed a pro se PCR petition and later amended it following the assignment of counsel. Woodson asserted trial counsel was ineffective by: failing to aggressively challenge the evidence S.S. was intellectually disabled and incapable of knowingly consenting to sexual acts; failing to challenge inconsistent testimony; failing to move for dismissal of the kidnapping and sexual assault charges; failing to have S.S. evaluated by an independent expert who "would have determined S.S. could consent to the sexual encounter" he admitted having with her; and advising defendant he could not testify.

He also alleged he was denied the right to a fair trial because: the assistant prosecutor engaged in misconduct by making inaccurate comments to the jury concerning the elements of kidnapping and sexual assault; the court erred by accepting a guilty verdict based on the foreman's affirmative response, "yes," to a question posed by the court instead of stating "guilty" or "not guilty"; and he was never provided with an indictment endorsed by the grand jury foreman. He further claimed his appellate counsel was ineffective by failing to raise the prosecutor's and court's alleged errors on appeal.

After hearing argument on Woodson's petition, the court issued a detailed written decision rejecting each of his claims. In sum, the court determined Woodson failed to present evidence establishing a prima facie case that either his trial or appellate counsel were ineffective under the two-prong standard established in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted for application under our State constitution in State v. Fritz, 105 N.J. 42, 58 (1987). The court further explained the trial record belied, and the applicable legal principles did not support, Woodson's various claims he was denied a fair trial. The court also concluded that because Woodson did not establish a prima facie claim entitling him to PCR, he was not entitled to an evidentiary hearing.

The court entered an order denying Woodson's PCR petition without an evidentiary hearing. This appeal followed.

C. Campbell's PCR Petition

Three months after Woodson filed his PCR petition, Campbell filed a pro se petition that he supplemented with a certification and an amended petition following the assignment of counsel. Campbell's pro se petition generally alleged "ineffective assistance of trial/appellate counsel" and more particularly asserted counsel failed to challenge the admission of the statement he gave to the police because he had not been informed of his "suspect status." He also

asserted the "prosecutor's comments . . . in summation had a clear capacity to deprive [him] of a fair trial."

In his supplemental certification supporting his amended PCR petition, Campbell claimed trial counsel was ineffective by failing to challenge the evidence S.S. "was mentally disabled," failing to "ask the court for a decision after an objection," and by pressuring him "into not taking the stand in [his] defense." Campbell averred his counsel advised he "could not elect to take the stand and testify," never explained "the pros and cons of testifying before the jury," and said he would "certainly lose the case" if he testified at trial.

Campbell further asserted that despite his repeated requests, trial counsel did not file a motion to suppress the statement he gave to the police. Campbell generally alleged he was not advised of a pending criminal complaint against him at the time he was interrogated by the police. Campbell also claimed his trial counsel was ineffective by failing to challenge the State's evidence that S.S. was mentally disabled.

The court heard argument on Campbell's petition and issued a written decision denying the petition without an evidentiary hearing. The court separately analyzed each of Campbell's claims and determined they were either undermined by the record or Campbell otherwise failed to present evidence

establishing a prima facie case of ineffective assistance of counsel under the Strickland standard.

Campbell appealed from the court's order denying his PCR petition without an evidentiary hearing.

D. Defendants' Arguments On Appeal

In A-2179-20, Woodson presents the following arguments for our consideration:

POINT I

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS.

A. Trial Counsel Failed to Seek an Expert to Challenge the State's Expert Regarding the Alleged Victim's Mental Disability and Her Inability to Consent to Sex.

B. Trial Counsel Abridged Defendant's Constitutional Right to Testify.

In A-1705-20, Campbell presents the following arguments:

POINT I

THE TRIAL ATTORNEY'S PERFORMANCE WAS DEFICIENT WHERE HE FAILED TO CONDUCT A PRETRIAL INVESTIGATION AS TO WHETHER AN EXPERT OPINION WAS NEEDED REGARDING AN INTELLECTUALLY DISABLED

PERSON'S ABILITY TO CONSENT TO SEXUAL
RELATIONS WITH ANOTHER.

POINT II

THE PCR JUDGE ERRED WHERE HE REJECTED
OUT-OF-HAND DEFENDANT'S CERTIFICATION.

POINT III

THE PCR JUDGE ERRED WHERE HE EQUATED
THE REVIEW OF THE PREJUDICE PRONG OF THE
STRICKLAND/FRITZ TEST TO AN APPELLATE
REVIEW OF A TRIAL JUDGE'S INCORRECT
RULING FOR HARMLESS ERROR.

II.

We have separately considered the arguments presented in defendants' appeals, and we observe they focus solely on the courts' rejection of certain of their ineffective-assistance-of-counsel claims. That is, in their respective appeals defendants each argue the PCR courts erred by rejecting claims their trial counsel provided ineffective assistance by failing to investigate whether an expert witness should be obtained to counter the State's evidence S.S. was intellectually challenged and therefore lacked the ability to knowingly consent to sexual activity. Defendants both argue the PCR courts erred by denying their claims their counsel were ineffective by acting to deny their right to testify at trial. Campbell claims his counsel was ineffective by failing to prosecute a

motion to bar the State from arguing that evidence of an anal tear does not support a finding of nonconsensual sex. Both Woodson and Campbell argue the court erred by denying their ineffective-assistance-of-counsel claims without evidentiary hearings.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard of review applies to mixed questions of fact and law. Id. at 420 (citing McCandless v. Vaughn, 172 F.3d 255, 265 (3d Cir. 1999)). Where, as here, an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421 (emphasis in original) (citing Zettlemoyer v. Fulcomer, 923 F.2d 284, 291 n.5 (3d Cir. 1991)). We apply that standard here.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee a defendant in a criminal proceeding the right to the assistance of counsel in his defense. The right to counsel includes "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 518, 541 (2013) (quoting Strickland, 466 U.S. at 686).

In Strickland, the Court established a two-part standard to determine whether a defendant has been deprived of the effective assistance of counsel. Strickland, 466 U.S. at 687. Under the first prong of the Strickland standard, a petitioner must show counsel's performance was deficient by demonstrating counsel's handling of the matter "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687-88.

Under the second prong, a defendant must "affirmatively prove" "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Strickland, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid. Our analysis under the second prong also considers the strength of the evidence presented to the jury, observing a "verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 696).

A petitioner must establish both prongs of the Strickland standard to obtain a reversal of the challenged conviction. Strickland, 466 U.S. at 687; Nash, 212 N.J. at 542; Fritz, 105 N.J. at 52. A failure to satisfy either prong of the Strickland standard requires the denial of a petition for PCR. Strickland, 466 U.S. at 700.

A. Defendants' Claims Their Respective Counsel Were Ineffective By Failing To Confer With, Or Retain, An Expert Witness

As noted, in their separate appeals, Woodson claims trial counsel was ineffective by failing to investigate the retention of an expert witness to counter Schlesinger's testimony S.S. suffered from an intellectual disability and was unable to voluntarily consent to the sexual acts upon which the charges against him are based. Campbell averred his counsel was ineffective by failing to confer with experts concerning S.S.'s alleged disability and inability to consent to the sexual acts. The PCR courts rejected these contentions, finding defendants failed to present adequate evidence establishing prima facie ineffective-assistance-of-counsel claims under the Strickland standard. We agree.

Counsel may be deficient for "fail[ure] to conduct an adequate pre-trial investigation." State v. Porter, 216 N.J. 343, 352-53 (2013) (collecting cases). Where a defendant alleges counsel rendered ineffective assistance by

"inadequately investigat[ing] his case," the defendant "must assert the facts that an investigation would have revealed, supported by affidavits or certifications upon the personal knowledge of the affiant or the person making the certification." Id. at 353 (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)); accord R. 3:22-10(c). Accordingly, when "absent witnesses . . . have never been identified and their potential testimony has never been described," then counsel's failure to investigate them is "purely speculative" and "insufficient to justify reversal." Fritz, 105 N.J. at 64.

In their respective PCR petitions, defendants assert in conclusory fashion counsel failed to investigate whether an expert witness would have supported a claim that S.S. either did not suffer from an intellectual disability or was capable of voluntarily consenting to the acts of vaginal and anal penetration with which defendants were charged. Beyond their conclusory and speculative assertions an investigation would have yielded an expert who would have countered Schlesinger's opinion S.S. suffered from an intellectual disability and was incapable of voluntary consent to the vaginal and anal penetration to which she was subjected, defendants' respective petitions offer no facts or competent evidence as to what a putative expert, if obtained through an investigation, would have opined if retained and called to testify at trial, or would have offered

to trial counsel that would have assisted in defending against the charges. See Porter, 216 N.J. at 352-53.

Defendants each failed to present any facts establishing that the investigations they claim their respective counsel failed to undertake would have yielded evidence either undermining Schlesinger's testimony or supporting their respective defenses. Trial counsel's performance is not deficient by failing to conduct an investigation that would not have yielded any evidence supporting a defense or undermining the State's case. Cf. State v. Worlock, 117 N.J. 596, 625 (1990) (citing Strickland, 466 U.S. at 688) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

A defendant claiming counsel was ineffective by failing to conduct a proper investigation is required to proffer "the facts that an investigation would have revealed, supported by affidavits or certifications." Cummings, 321 N.J. Super. at 170. In their respective cases, defendants independently failed to satisfy that burden. We therefore agree with the courts' determinations that defendants failed to establish prima facie ineffective-assistance-of-counsel claims based on their counsel's alleged failures to investigate whether a qualified expert would have provided evidence S.S. did not suffer from an intellectual

disability and was otherwise capable of knowingly and voluntarily consenting to the acts of penetration charged in the indictment.

B. Defendants' Claims Their Respective Counsel Were Ineffective By Advising Them Not To Testify At Trial

Defendants claim their respective counsel were ineffective by advising them, in different ways, not to testify at trial or that they could not testify at trial. Woodson claims counsel "abridged" his right to testify at trial by informing him he "could not" testify at trial and by failing to advise him of the pros and cons of testifying. Campbell similarly asserts his counsel's performance was deficient by failing to advise him of the pros and cons of testifying at trial, and by stating "he could not elect to take the stand," and, if he did, he "would certainly lose the case." Campbell further claims his counsel erred by acknowledging at trial that during his statement to the police, Campbell lied about "whether he had sex with S.S. in [Woodson's] basement," and by advising defendant not to testify at trial.

A court "evaluate[s] claims involving the denial of a defendant's right to testify under the Strickland/Fritz test." State v. Bey, 161 N.J. 233, 271 (1999). A prima facie showing of ineffective assistance of counsel under this test requires "more than . . . bald assertions that [defendant] was denied the effective

assistance of counsel." Cummings, 321 N.J. Super. at 170. Defendant may not obtain an evidentiary hearing to explore potential PCR claims, State v. Marshall, 148 N.J. 89, 157-58 (1997), nor may he "create a genuine issue of fact, warranting an evidentiary hearing, by contradicting his prior statements without explanation," State v. Blake, 444 N.J. Super. 285, 299 (App. Div. 2016) (citing Shelcusky v. Garjulio, 172 N.J. 185, 201-2 (2002)). As we have explained, a prima facie showing requires "defendant [to] allege specific facts and evidence supporting his allegations." Porter, 216 N.J. at 355; see also R. 3:22-10(b) (grant of evidentiary hearing requires "material issues of disputed fact that cannot be resolved by reference to the existing record").

In his PCR petition, Woodson claimed counsel was ineffective by advising he "could not" testify and his "prior criminal history might affect [his] believability and that [he] would be subject to cross-examination." Woodson further asserted "the jury needed to hear [his] side of the story to evaluate the whole case," and he "would have withstood attacks [on his] credibility."

We find no basis to conclude counsel erred by advising Woodson his prior criminal history might affect his credibility at trial, see generally N.J.R.E. 609 (allowing, subject to N.J.R.E. 403, admission of a witness's prior criminal convictions to affect the witness's credibility), and that he would be subject to

cross-examination.⁵ Defendant does not assert or present any facts establishing the advice from his counsel was erroneous or deficient, or that he suffered any prejudice under Strickland's second prong based on it. See Strickland, 466 U.S. at 687 (requiring a defendant to present facts establishing both prongs of the standard to satisfy ineffective-assistance-of-counsel standard); Nash, 212 N.J. at 542 (same). And we find no basis in the record or the applicable legal principles establishing the advice either "fell below an objective standard of reasonableness" or constituted an "error so serious . . . counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88.

Woodson's other claim is his counsel "abridged" his right to testify at trial by stating he "could not" testify at trial. Of course, Woodson "could" testify at trial, and he had the right to do so on his own behalf. However, even accepting Woodson's sworn representation his counsel erroneously advised him he "could not" testify at trial, we agree with the PCR court Woodson failed to satisfy his

⁵ We observe that at the time of defendants' 2015 trial, Woodson's prior criminal record included two 2005 convictions for third-degree aggravated assault for which Woodson received concurrent three-year prison sentences, and a 2008 conviction for a third-degree offense. Woodson did not argue or establish those convictions were inadmissible to challenge his credibility at trial. See N.J.R.E. 609.

burden under the Strickland standard because the record, including Woodson's sworn testimony before the trial court, establishes he did not suffer any prejudice as a result of counsel's putative error.

"Although a demonstration of prejudice constitutes the second part of the Strickland analysis, courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012) (internal citation omitted) (citing Strickland, 466 U.S. at 697). We apply that standard here because even assuming counsel advised Woodson he could not testify, Woodson failed to present evidence establishing a reasonable probability that but for his counsel's alleged error, the result of his trial would have been different. Strickland, 466 U.S. at 694.

Woodson's PCR petition also does not address the prejudice prong of the Strickland standard. Nor could Woodson satisfy his burden under Strickland's second prong because during its questioning of Woodson at trial, the court established Woodson knew of his right to testify, he knowingly waived the right to testify, and his decision was voluntary and not the result of any pressure from his counsel. See Blake, 444 N.J. Super. at 299 (explaining a PCR petitioner

"may not create a genuine issue of fact, warranting an evidentiary hearing, by contradicting prior statements without explanation").

In response to the trial court's questioning, Woodson testified he was aware of his right to "testify in front of the jury," he "discuss[ed] . . . with his attorney[] whether [he] should take the stand," he received "the benefit of [trial counsel's] input and advice," trial counsel "answer[ed] all of [his] questions," he did not "need any additional time to talk to [trial counsel]," he decided not to exercise his right to testify, his decision was voluntary, and nobody "forc[ed] [him], threaten[ed] [him], or pressur[ed] [him] in any way to make [his] decision."

Woodson's testimony undermines any claim he suffered prejudice under the Strickland standard as a result of counsel's purported erroneous advice Woodson could not testify at trial. Most simply stated, Woodson's testimony confirmed he knew he could testify at trial and established he made a knowing and voluntary decision not to testify. Having failed to make any showing of prejudice under Strickland's second prong, and because the competent evidence — Woodson's testimony under questioning from the court — established he knew he could testify at trial if he opted to do so, Woodson's did not sustain his burden of establishing a prima facie case of ineffective assistance of trial counsel

under the Strickland standard. Strickland, 466 U.S. at 700 (explaining a failure to satisfy either prong of the Strickland standard requires the denial of a PCR petition). The court therefore properly denied Woodson's PCR claim.

Campbell similarly argues his counsel's performance was deficient by advising him that if he testified at trial he "would certainly lose the case" and by failing to inform him of the pros and cons of testifying at trial. Campbell, however, fails to present any evidence establishing that had his counsel not erred in the manner he alleges, he would have testified at trial and there is a reasonable probability his testimony would have changed the result at trial. Indeed, Campbell's two certifications supporting his PCR petition do not state he would have testified at trial if his counsel had not erred in the manner he alleges, and do not detail the testimony he would have offered that he contends would have changed the result at trial. In other words, even assuming counsel's performance was deficient in the manner Campbell alleges, he failed to satisfy his burden of establishing prejudice as required under the second prong of the Strickland standard. See Strickland, 466 U.S. at 694; Gideon, 244 N.J. at 551; see also Gaitan, 209 N.J. at 350 (explaining the failure to satisfy Strickland's second prong requires denial of an ineffective-assistance-of-counsel PCR claim).

Moreover, like Woodson, Campbell stated in response to questioning by the court at trial that: he knew he had the right to testify; he understood he would be subject to cross-examination if he testified; he spoke to counsel about whether he should testify; counsel answered all of his questions about whether he should testify; no one pressured him into making the decision about testifying; and he decided not to testify. In his certifications supporting his PCR petition, Campbell failed to offer any facts explaining the inexplicable contradiction between his conclusory assertion to the PCR court that his counsel pressured him into not testifying and his sworn testimony at trial that his counsel discussed with him whether he should testify and that he was not pressured by anyone into making his decision not to testify. Campbell's claim his counsel's performance was deficient finds no support in any competent evidence, Blake, 444 N.J. Super. at 299, and, even if it did, he fails to demonstrate he suffered any prejudice under the second prong of the Strickland standard, see Strickland, 466 U.S. at 694.

Campbell also claims his counsel's performance was deficient by conceding to the jury he was not truthful when, in his initial statement to the police, he denied sexually penetrating S.S. Counsel's admission constituted a clear and strategic concession to the fact established by the DNA test results,

obtained after Campbell's statement to the police, confirming Campbell's anal penetration of S.S.

In the first instance, Campbell did not establish his counsel's concession "fell below an objective standard of reasonableness" and constituted an "error[]" so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88. We "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690.

Counsel was presented with difficult facts at trial. In his statement to the police, Campbell denied engaging in any acts of sexual penetration with S.S. However, subsequent DNA test results confirmed he was a contributor to semen found in anal swabs from S.S. Moreover, Barksdale would testify at trial that Campbell vaginally and anally penetrated S.S. Confronted with those facts, it is clear counsel made the strategic decision to minimize defendant's initial untruthful denial concerning his penetration of S.S. in light of the contrary and compelling DNA evidence, in an effort to shift focus to the more feasible, albeit ultimately unsuccessful, defense that S.S. consented to the sexual penetration.⁶

⁶ Although Campbell does not raise it, we note his counsel's concession does not implicate McCoy v. Louisiana, 138 S.C. 1500, 1510 (2018)

Indeed, if counsel had not attempted to diffuse Campbell's initial denial of penetration in light of the DNA evidence establishing anal penetration and Barksdale's testimony, the State would have made the point defendant's initial statement was untruthful.

Counsel's performance was not deficient by admitting an obvious and irrefutable adverse fact — Campbell falsely denied anal penetration in his initial statement — in an effort to minimize the import of the untruthful statement and focus the jury on Campbell's trial defense that the anal penetration the DNA results established, and Barksdale described at trial, was consensual. See State v. Castagna, 187 N.J. 293, 314 (2006) (explaining "[t]he quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt").

(explaining "counsel may not admit [a] client's guilt of a charged crime over the client's intransigent objection to that admission") because Campbell continues to endorse his counsel's trial strategy that S.S. consented to the vaginal and anal penetration and was mentally capable of knowingly and voluntarily doing so. Trial counsel's concession that Campbell's initial statement asserting he did not penetrate S.S. was inaccurate was thus not an admission of Campbell's guilt to any offense.

Campbell did not sustain his burden under Strickland's first prong, and he further failed to demonstrate that but for his counsel's admission that he made a false statement denying penetration to the police, there is a reasonable probability the result of his trial would have been different. Nor could Campbell establish prejudice because, as noted, if counsel did not acknowledge Campbell's initial statement denying penetration was false, the State would cite the DNA test results and Barksdale's testimony to establish it was. In sum, Campbell failed to carry his burden under both prongs of the Strickland standard on his claim counsel was ineffective by acknowledging he falsely reported to the police he did not vaginally or anally penetrate S.S. in Woodson's home.

C. Campbell's Claim Counsel Was Ineffective By Failing To Challenge The Prosecutor's Argument Concerning The Anal Tear

We also reject Campbell's claim his counsel was ineffective by failing to move to bar, or otherwise challenge, the assistant prosecutor's argument that S.S.'s anal tear constituted evidence she was subject to nonconsensual anal penetration. We need not determine whether counsel's performance was deficient as alleged because Campbell does not, and cannot, establish prejudice under the Strickland standard. As we explained on his direct appeal, the prosecutor's comment concerning the anal tear was "fleeting" and did not

"substantially prejudice[] [Campbell's] right to a fair trial." M.C., Nos. A-1137-15, A-1148-15 (slip op. at 42). As a result, even if counsel erred in some fashion by not challenging the prosecutor's statement, Campbell cannot demonstrate, and otherwise fails to demonstrate, there is a reasonable probability that but for his counsel's purported error, there is a reasonable probability the result of his trial would have been different.

D. Defendants' Claims The Courts Erred By Denying Their PCR Petitions Without An Evidentiary Hearing

Defendants separately contend the PCR courts erred by denying their PCR petitions without an evidentiary hearing. Defendant also argues the court erred by denying the PCR petition without an evidentiary hearing. We reject the argument in both cases because an evidentiary hearing is not required on a PCR petition where the petitioner does not sustain his burden of establishing a prima facie ineffective-assistance-of-counsel claim. Porter, 216 N.J. at 355; R. 3:22-10(b). As we have explained, Woodson and Campbell failed to establish a prima facie ineffective-assistance-of-counsel claim in their respective PCR petitions. Therefore, neither is entitled to an evidentiary hearing.

We have separately considered all the arguments presented in these appeals and to the extent we have not expressly addressed an argument, we have

determined it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed in A-1705-20 and A-2179-20.

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



CLERK OF THE APPELLATE DIVISION