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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2808-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERNEST P. DAVIS,

Defendant-Appellant.

Submitted May 12, 2022 – Decided May 23, 2022

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Indictment No. 15-12-0988.

Joseph E. Krakora, Public Defender, attorney for appellant (John J. Bannan, Designated Counsel, on the brief).

Jeffrey H. Sutherland, Cape May County Prosecutor, attorney for respondent (Gretchen A. Pickering, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Ernest P. Davis appeals from the February 17, 2021 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

We set forth the pertinent procedural history and facts of this matter in our prior opinion on defendant's direct appeal of his convictions and sentence. State v. Davis, No. 0934-17 (App. Div. Sept. 12, 2019) (slip op. at 3-7). We incorporate that discussion by reference here and recite only the most salient facts from the record.

Defendant and his girlfriend spent the day on defendant's boat, which was docked in Lower Township. Id. at 5. They left the boat once to buy beer, but were on the boat from early afternoon until approximately 10:30 p.m. Ibid. The couple drank and watched television. Ibid. The night was stormy, with heavy rain and wind. Ibid.

Defendant and his girlfriend began to argue when she refused to have sex with him. Ibid. As the evening progressed, defendant repeatedly threatened to kill his girlfriend. Ibid. She remained on the boat but after defendant brought out his shotgun and pointed it at her face, she called and texted her sister to come and pick her up at the dock. Id. at 5-6.

When defendant's girlfriend tried to leave the boat by climbing over a rail onto a neighboring craft, defendant shot her foot off of her left leg. Id. at 6.¹ The girlfriend screamed, and defendant kissed her on the forehead, said he was sorry, and left. Ibid. Defendant went to the neighboring boat and asked the owner to help him get rid of the shotgun. Ibid. The owner refused. Ibid. The police later recovered the shotgun in the water behind the neighboring boat. Id. at 7.

A jury found defendant guilty of first-degree attempted murder, N.J.S.A. 2C:5-1(a)(1) and 2C:11-3(a)(1) (count one); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count two); second-degree possession of a shotgun for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count three); and third-degree hindering apprehension, N.J.S.A. 2C:29-3(b) (count four). Id. at 3-4. Following a bench trial, the judge acquitted defendant of second-degree certain persons not to have firearms, N.J.S.A. 2C:39-7. Ibid. The judge merged count two into count one and sentenced defendant to an extended term of thirty-eight years in prison, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. Id. at 4. The judge imposed concurrent terms on counts three and four. Ibid. We affirmed

¹ Doctors later had to amputate the girlfriend's left leg from her calf down. Ibid.

defendant's convictions and sentence on direct appeal, id. at 3, and the Supreme Court denied certification. State v. Davis, 240 N.J. 556 (2020).

Defendant raised a number of arguments in his PCR counsel's brief and in his pro se supplemental brief. However, he addresses only three of them in this appeal.

First, defendant argued his trial attorney failed to object to the trial judge's jury instruction on the attempted murder charge. Defendant claimed he did not intend to kill his girlfriend because did not shoot her in a "vital part" of her body, but instead aimed the shotgun at "a non-vital part of the body, [the] victim's lower leg." Defendant asserts his attorney should have asked the judge to include an instruction that the jury should infer that defendant only intended to injure defendant, rather than to kill her.

The trial court found this argument lacked merit. The court noted the trial judge followed the model jury charge for attempted murder, which specifically permits the jury to "consider the weapon used and the manner and circumstances of the attack." Model Jury Charges (Criminal), "Attempted Murder (N.J.S.A. 2C:5-1 and 2C:11-3(a)(1))" (approved Dec. 7, 1992). In addition, the court found that "a specific jury instruction in connection to aiming a deadly weapon at a non-vital body part is not explicitly contained in the Model Charges, nor is

one recognized under New Jersey case law." Therefore, the court determined defendant's trial attorney was not ineffective by failing to request this instruction.

Second, defendant argued his trial and appellate attorneys were ineffective because they did not argue that the evidence was insufficient to support his conviction for attempted murder. Defendant asserted he shot his girlfriend in the leg and, therefore, the State failed to prove he intended to cause her death.

The trial court rejected this contention. The court found "the case against [d]efendant presented at trial was very strong." Defendant's girlfriend testified that defendant repeatedly threatened to kill her throughout the afternoon and evening, and he pointed the shotgun at her face. Defendant shot the victim as she was trying to escape over the rail of the boat. The victim also told her sister to come get her because she was feared for her life due to defendant's threats. Defendant did not assist his girlfriend after he shot her foot off; instead, he said goodbye, left the boat, and got rid of his shotgun. Because there was ample evidence in the record supporting the jury's verdict, the court concluded defendant's trial and appellate attorneys were not required to challenge the sufficiency of the evidence.

In his third argument, defendant argued his trial counsel erred by failing to raise an intoxication defense. The trial court found this argument also lacked merit. A voluntary intoxication defense can only succeed "if there exists a 'rational basis for the conclusion that [the] defendant's "faculties" were so "prostrated" that he or she was incapable of forming' the requisite intent." State v. Bauman, 298 N.J. Super. 176, 194 (App. Div. 1997) (quoting State v. Mauricio, 117 N.J. 402, 418-19 (1990)). "Among the factors pertinent to this issue are included the quantity of the intoxicant consumed, the period of time involved, the defendant's ability to recall significant events[,] and his conduct as perceived by others." State v. Johnson, 309 N.J. Super. 237, 266 (App. Div. 1998).

The trial court determined the evidence failed to support defendant's claim he was intoxicated at the time of the shooting. While noting that defendant and the victim were drinking prior to the shooting, the court found

[d]efendant's conduct before, during[,] and after [the] shooting does not give any credence to [d]efendant's contention that an intoxication defense was appropriate, specifically due to his threats to kill [his girlfriend], his kissing her on the forehead after shooting her, as well as his going to the [neighboring boat] and attempting to get rid of the shotgun.[□] This conduct shows that [d]efendant was aware enough of his faculties that he knew what he had just done was wrong. Accordingly, [d]efendant has not shown how

trial counsel was deficient in not presenting a defense of intoxication.

On appeal, defendant raises the following contentions:

POINT I

BECAUSE [DEFENDANT] RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR PCR.

- A. Legal Standards Governing Applications for Post-Conviction Relief.
- B. Defense Counsel was Ineffective, For Among Other Reasons, Failing to Object to An Improper Jury Charge and Failing to Raise a Sufficiency of the Evidence Issue on Appeal.
- C. Defense Counsel was Ineffective For Failing to Raise the Overall Unfairness of the Sentence. [(Not Raised Below).]
- D. Defense Counsel was Ineffective For Failing to Object and Seek a Curative Instruction During the Testimony of Kerry Randolph. [(Not Raised Below).]
- E. Defense Counsel was Ineffective For Failing to Object and Seek a Curative Instruction During the State's Closing to the Jury. [(Not Raised Below).]
- F. Defense Counsel was Ineffective For Failing to Request a Jury Charge on the Intoxication Defense.

POINT II

IN THE ALTERNATIVE, BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, THE PCR COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

- A. Legal Standards Governing Post-Conviction Relief Evidentiary Hearings.
- B. In the Alternative, [Defendant] is Entitled to an Evidentiary Hearing.

When petitioning for PCR, the defendant must establish, by a preponderance of the credible evidence, that he or she is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013); State v. Preciose, 129 N.J. 451, 459 (1992). To sustain that burden, the defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing and the defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed facts lie outside the record, and resolution of the issues

necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. Preciose, 129 N.J. at 462.

To establish a prima facie claim of ineffective assistance of counsel, the defendant is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Further, because prejudice is not presumed, Fritz, 105 N.J. at 52, the defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceeding. United States v. Cronin, 466 U.S. 648, 659 n.26 (1984).

In Points I(B) and I(F), defendant raises the same arguments he presented to the trial court on the propriety of the jury instruction on attempted murder, the sufficiency of the evidence, and the possibility of an intoxication defense. Having considered these contentions in light of the record and the applicable law, we affirm the denial of defendant's PCR petition substantially for the reasons detailed at length in the trial court's written opinion. We discern no

abuse of discretion in the court's consideration of the issues, or in its decision to deny the petition without an evidentiary hearing. We are satisfied that the trial and appellate attorneys' performances were not deficient, and defendant provided nothing more than bald assertions to the contrary.

We also reject the arguments defendant presents in Points I(C), I(D), and I(E) because he did not raise any of these contentions before the trial court. "We generally 'decline to consider questions or issues not properly presented to the trial court . . . unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" State v. Marroccoli, 448 N.J. Super. 349, 373 (App. Div. 2017) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Neither of these exceptions applies to this case and, therefore, we will not consider defendant's newly minted contentions here.²

² Nevertheless, we note that defendant unsuccessfully challenged his sentence on direct appeal. Davis, slip op. at 14-15. Therefore, there is no basis for his claim in Point I(C) that his trial or appellate attorneys were ineffective for failing to make this claim. Contrary to defendant's contention in Point I(D), the testimony of the victim's sister was fully corroborated by the victim's own testimony that defendant threatened to kill her, and that she feared for her life. Therefore, there was no need for a curative instruction concerning the sister's testimony. Finally, there was no need for the trial judge to issue a sua sponte curative instruction concerning any aspect of the prosecutor's summation. Therefore, defendant's arguments in Point I(E) also lack merit.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION