RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3659-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.S.,[1]

Defendant-Appellant.

Submitted March 7, 2022 – Decided April 14, 2022

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 13-05-0673.

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

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

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[1] We use initials to protect the identity of the victim. R. 1:38-3(c)(12).

PER CURIAM

Defendant M.S. appeals from a November 11, 2019 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. The PCR judge, who was also the trial judge, entered the order and rendered a cogent oral decision, rejecting defendant's contentions.

On appeal, defendant maintains his trial counsel rendered ineffective assistance by failing to call as a witness the DNA expert he had consulted pretrial.[2] Defendant's argument is limited to the following point:

> THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS BY NOT HAVING A DNA EXPERT TESTIFY.

We disagree and affirm.

I.

In 2013, a Middlesex County jury convicted defendant of second-degree sexual assault by physical force, N.J.S.A. 2C:14-2(c)(1), as a lesser-included offense of aggravated sexual assault, and third-degree criminal sexual contact,

[2] The PCR judge also denied defendant's other two points because they raised the same issues we rejected on appeal. See R. 3:22-4(a)(1) (barring previously raised claims).

N.J.S.A. 2C:14-3(a), for sexually abusing his intoxicated nineteen-year-old stepdaughter. Defendant was sentenced to an aggregate prison term of eight years, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on the sexual assault conviction. On direct appeal, we upheld defendant's convictions but remanded for resentencing, without consideration of aggravating factor three on both convictions and aggravating factor two on the aggravated criminal sexual contact conviction. State v. M.S., No. A-4928-15 (slip op. 15) (App. Div. July 30, 2018), certif. denied, 236 N.J. 612 (2019).

The details underlying defendant's convictions are set forth in our prior opinion and need not be repeated here. Id. at 2-5. Pertinent to this appeal, three days after the incident, the victim contacted the police and was examined at a rape crisis center, where a forensic examination was performed and a rape kit was completed. Id. at 4. Semen was detected in the swab taken from the victim's vagina and submitted for DNA testing with defendant's buccal swab. Ibid.

The victim testified she did not engage in sexual intercourse with anyone during the three days between the date of the incident and her report to police. Although defendant denied he sexually assaulted his stepdaughter, he acknowledged much of the victim's testimony, including her highly intoxicated state. Defendant also told the jury he took the victim home, removed her dress

and bra, placed her in his bed, and slept on the sofa. But the consensual call between defendant and the victim suggested a different scenario: defendant initially said the victim took off her clothes; he then acknowledged he unsnapped her bra and "helped [her] take off [her] dress." During deliberations, the jury asked for playback of the consensual call.

The State also presented the testimony of its DNA forensic science expert, Lynn Crutchley. We explained Crutchley's findings in our prior opinion, as follows:

> In addition to performing traditional "STR DNA testing," on the samples obtained from defendant and [the victim], Crutchley performed "Y-STR testing[,]" which focuses "strictly on male DNA." Y-STR testing is useful where, as here, there is a prevalence of female DNA in the vaginal samples.
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> The results of the traditional STR testing were inconclusive as to the presence of defendant's DNA. However, Crutchley testified defendant and "all of his paternal male relatives cannot be excluded as possible contributors to the Y-STR DNA profile obtained." Crutchley also indicated that profile "is expected to occur no more frequently than . . . 1 in 1,444 of the Hispanic population."
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> [Id. at 4-5.]

Prior to trial, defendant's assigned counsel consulted Richard Saferstein, Ph.D., an expert in DNA analysis, who did not testify at trial. Dr. Saferstein's

May 29, 2014 correspondence to trial counsel echoed Crutchley's findings, noting "the New Jersey State Police Laboratory correctly calculated the frequency of the Y-STR profile generated from the [v]aginal [s]wabs . . . as 1 in 1,444 individuals of Hispanic de[s]cent."[3] Dr. Saferstein briefly concluded:

> Given the current population of New Jersey the possible number of males of Hispanic de[s]cent other than [defendant] that could have contributed the Y-STR profile developed from the [v]aginal [s]wabs . . . [totals] approximately 500 individuals.
>
> Under these circumstances, the Y-STR data in this case does not associate [defendant] with the male DNA recovered from the [v]aginal [s]wabs . . . with any reasonable degree of scientific certainty.

On cross-examination, trial counsel elicited testimony from Crutchley, emphasizing she could not conclude the sample from the victim's vagina contained defendant's DNA. The following exchanged ensued:

> TRIAL COUNSEL: [T]he Y-STR isn't as specific as the STR, correct?
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> CRUTCHLEY: Absolutely correct. And that's why we have in our statement that it is expected that all of

[3] According to the trial record, Dr. Saferstein "authored two reports in this case, both squarely dealing with statistics, nothing about the DNA, nothing about the life of sperm, nothing about how sperm is transferred, anything like that." In its responding brief on appeal, the State asserts Dr. Saferstein's reports were not provided on appeal because they were not presented to the PCR judge. Only the May 29, 2014 correspondence was provided on appeal; neither party suggests this correspondence was one of Dr. Saferstein's reports.

> [defendant's] paternally related male relatives also cannot be excluded as having contributed to this stain.
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> TRIAL COUNSEL: But as I read your report here, it doesn't seem like it's just his direct lineage that can be excluded from this profile. Is that correct?
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> CRUTCHLEY: That can be excluded from the profile?
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> TRIAL COUNSEL: Correct. Let me rephrase. When I look at your report here, you say the Y-STR DNA profile obtained from this or these specimens is expected to occur no more frequently than . . . 1 in 1,444 of the Hispanic population.
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> CRUTCHLEY: Correct.
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> TRIAL COUNSEL: Does that mean that, generally speaking, if you look at the pool of approximately 350 million people in the country and divided that in, you would have a number of people matching the Y-STR profile of the subject?
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> CRUTCHLEY: Absolutely. It would be that number divided by whatever number the population was. It's a pretty large number.

During his summation, trial counsel emphasized the speculative nature of DNA evidence and Crutchley's testimony:

> Then we heard from Ms. Crutchley, the forensic scientist. And I think we all got quite a lesson in DNA. I think we all learned that DNA is not like what we see on TV, in real life. There are times that DNA can exclude people to one in a quintillion, ten times the population of the planet. Then you pretty much know it's him, usually, maybe, depending on other factors.

. . . .

> You heard Ms. Crutchley testify because this isn't a matter of one in a billion, one in a quintillion, even one in a million. The chances of it being another Hispanic person is 1 in 1,444. I mean, that number is quite significant.

Trial counsel also highlighted Crutchley's partiality, arguing she "work[ed] for the prosecutor" and, as such, Crutchley was not the "independent scientist" that she was "supposed to be."

In December 2018, four months after the trial judge resentenced defendant pursuant to our remand order, defendant pro se filed a timely PCR petition. Citing portions of Dr. Saferstein's May 29, 2014 correspondence, defendant certified: "After trial, [counsel] informed [defendant] and members of [his] family that he did not call Dr. Saf[]erstein because the Office of the Public Defender would not agree to Dr. Saferstein's proposed fee." Accordingly, defendant asserted he and his family were not afforded the "opportunity to raise the necessary funds to pay Dr. Saferstein." Assigned counsel thereafter filed a supplemental submission.

Following argument, the PCR judge issued an oral decision denying PCR. Addressing defendant's contentions in view of the governing Strickland/Fritz[4] framework, the judge found defendant failed to demonstrate his trial attorney's "representation fell below an objective standard of reasonableness." The judge elaborated:

> [Trial] counsel consulted with a DNA expert, spoke to a DNA expert, had letters from the DNA expert, and used the evidence that was provided in his vigorous cross-examination of the State's expert and in his impassioned closing argument to the jury. [Trial counsel argued] . . . the DNA evidence did not specifically point to this individual person, [and] that the population of other people that the DNA evidence profiles could have applied to was a relatively small one. For the Hispanic population it was . . . approximately 500.
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> . . . .
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> The fact that [trial] counsel did exercise his judgment in consulting with and speaking to a DNA expert does not constitute ineffective assistance of counsel. He used the material that he learned from Dr. Saferstein in his cross-examination and preparation, and it's indicated [in the record].

[4] Strickland v. Washington, 466 U.S. 668, 687 (1984) (recognizing to establish an ineffective assistance of counsel claim, a defendant must demonstrate: (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense"); State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey).

The judge concluded: "[T]he State's expert actually matches what the defense expert said – that there were a number of people that match the profile and it was a pretty large number of people." This appeal followed.

On appeal, defendant maintains the DNA evidence presented to the jury "was of utmost significance." He further asserts Dr. Saferstein's conclusion that the DNA at issue "cannot be associated within a medical degree of certainty" "was an extremely strong statement," which should have been presented to the jury.

II.

When reviewing such claims of ineffectiveness, courts apply a strong presumption that defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. "[C]omplaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy." Fritz, 105 N.J. at 54 (quoting State v. Williams, 39 N.J. 471, 489 (1963)); see also State v. Echols, 199 N.J. 344, 357-59 (2009).

"The 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." State v.

Castagna, 187 N.J. 293, 314 (2006); see also State v. Marshall, 123 N.J. 1, 165 (1991). "As a general rule, strategic miscalculations or trial mistakes are insufficient to warrant reversal 'except in those rare instances where they are of such magnitude as to thwart the fundamental guarantee of [a] fair trial.'" Id. at 314-15 (alteration in original) (quoting State v. Buonadonna, 122 N.J. 22, 42 (1991)). Moreover, "'an otherwise valid conviction will not be overturned merely because the defendant is dissatisfied with his or her counsel's exercise of judgment during the trial.'" State v. Allegro, 193 N.J. 352, 367 (2008) (quoting Castagna, 187 N.J. at 314).

The applicable law further instructs that to obtain an evidentiary hearing on a PCR petition based upon claims of ineffective assistance of counsel, a defendant must make a prima facie showing of both deficient performance and actual prejudice. State v. Preciose, 129 N.J. 451, 463 (1992). "To establish such a prima facie case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997); see also R. 3:22-10(b).

"When determining the propriety of conducting an evidentiary hearing, the PCR court should view the facts in the light most favorable to the defendant." State v. Jones, 219 N.J. 298, 311 (2014); see also Marshall, 148 N.J. at 158;

Preciose, 129 N.J. at 462-63. "However, a defendant is not entitled to an evidentiary hearing if the 'allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing[.]'" State v. Porter, 216 N.J. 343, 355 (2013) (alteration in original) (quoting Marshall, 148 N.J. at 158).

When a defendant claims his trial attorney failed to call certain witnesses, we ultimately consider "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." State v. L.A., 433 N.J. Super. 1, 16 (App. Div. 2013); see also State v. Bey, 161 N.J. 233, 261-64 (1999) (declining to find ineffective assistance of counsel where the proffered testimony was "largely cumulative of evidence revealed by other . . . witnesses" and the "testimony would not have affected the jury's deliberations").

Moreover, bald assertions of deficient performance are insufficient to support a PCR application. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999); see R. 3:22-10(c) (requiring a sworn statement "based upon personal knowledge of the declarant," supporting "[a]ny factual assertion that provides the predicate for [PCR]"); see also R. 1:4-4; R. 1:6-6.

Having applied these well-established standards to defendant's present appeal, we affirm the PCR judge's decision. We agree with the judge that defendant has not made a prima facie showing on the first prong of Strickland, i.e., deficient performance by trial counsel relating to the DNA evidence. From our own review of the trial transcripts, we share the judge's assessment that defense counsel capably attempted to undermine the State's DNA proofs linking him to the genetic material found in the victim's vagina. The fact that the jury ultimately was persuaded by the State's evidence and found defendant guilty does not indicate defense counsel's efforts fell below the standards of professional competency.

The PCR judge reasonably rejected defendant's claim that his trial attorney was professionally deficient because he did not call Dr. Saferstein as a witness. As the PCR judge observed, trial counsel consulted with Dr. Saferstein, who corroborated Crutchley's opinion. As one notable example, Dr. Saferstein's May 29, 2014 correspondence expressly asserts the State "correctly calculated the frequency of the Y-STR profile" obtained from the victim's vaginal swabs as "1 in 1,444 individuals of Hispanic de[s]cent."

Further, Dr. Saferstein's calculation of "500 individuals" other than defendant who matched the profile, is consistent with Crutchley's testimony –

and trial counsel's argument – that the pool consisted of a "large number of people." Thus, without calling Dr. Saferstein, whose testimony would have echoed the State's proofs, defense counsel's consultation with the expert facilitated effective cross-examination of Crutchley as underscored in his closing remarks to the jury. Given the statistical force of the DNA evidence, on this record, defendant has not demonstrated Dr. Saferstein's testimony would have undermined the State's proofs.

Moreover, defendant failed to support his PCR claim with any affidavits or certifications, including a sworn statement of Dr. Saferstein, explaining how the terse conclusions reached in his May 29, 2014 correspondence could support a prima facie claim of a Sixth Amendment violation. The same is true for defendant's assertion that trial counsel advised him post-trial that the public defender's office would not pay for Dr. Saferstein to testify at trial. In sum, defendant's "bald assertions" are inadequate to warrant relief or justify an evidentiary hearing. Cummings, 321 N.J. Super. at 170.

Having considered defendant's reprised contentions in view of the applicable law, we are satisfied he failed to satisfy the Strickland/Fritz test. Because there was no prima facie showing of ineffective assistance of counsel,

an evidentiary hearing was not necessary to resolve defendant's PCR claims. See Preciose, 129 N.J. at 462.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION