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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0287-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MALCOLM A. BRADLEY,
a/k/a HOOP BRADLEY,
MALCOLM H. BRADLEY,
and MALCOM BRADLEY,

Defendant-Appellant.

Submitted December 6, 2022 – Decided April 12, 2023

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Law
Division, Union County, Indictment No. 11-10-1031.

Joseph E. Krakora, Public Defender, attorney for
appellant (Andrew R. Burroughs, Designated Counsel,
on the briefs).

Matthew J. Platkin, Attorney General, attorney for
respondent (Regina M. Oberholzer, Deputy Attorney
General, of counsel and on the brief).

PER CURIAM

Defendant appeals the denial of his post-conviction relief (PCR) petition without an evidentiary hearing. He alleged ineffective assistance of both trial and appellate counsel. He presents the following arguments:

POINT I

AS DEFENDANT HAS SHOWN THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL HE WAS ENTITLED TO POST-CONVICTION RELIEF, OR IN THE ALTERNATIVE, TO AN EVIDENTIARY HEARING AS THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE.

1. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO CALL ZAKIA DIXON AS A WITNESS FOR THE DEFENSE.
2. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO ASK THE TRIAL COURT TO INSTRUCT THE JURY ON THE EFFECTS OF PCP ON MEMORY, OR IN THE ALTERNATIVE, FAILING TO INVESTIGATE AND PRESENT EXPERT WITNESS TESTIMONY ABOUT THE EFFECTS OF PCP ON MEMORY.
3. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO ADEQUATELY CROSS-EXAMINE JAMIE SCOTT ABOUT HER CHANGE OF STORY AFTER BEING INTERVIEWED BY SERGEANT MICHAEL [TRIARSI].

4. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO ASK FOR A SEQUESTRATION ORDER PRECLUDING SERGEANT TRIARSI FROM SITTING THROUGH THE ENTIRE TRIAL.

5. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO ASK THE TRIAL COURT TO INSTRUCT THE JURY ON THIRD-PARTY GUILT.

6. TRIAL COUNSEL'S CUMULATIVE ERRORS DENIED DEFENDANT EFFECTIVE LEGAL REPRESENTATION.

POINT II

APPELLATE COUNSEL WAS INEFFECTIVE BY FAILING TO ARGUE THAT THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A MISTRIAL WHEN THE JURY SAID IT COULD NOT REACH A VERDICT.

POINT III

AS THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, THE PCR COURT ERRED WHEN IT ADJUDICATED DEFENDANT'S CLAIMS WITHOUT AN EVIDENTIARY HEARING.

Upon a careful review of the record and applicable legal standards, we are unpersuaded and affirm for the reasons set forth by the PCR court.

I.

In the early morning hours of March 16, 2011, Kenneth Roberts, his girlfriend, Jamie Scott, and his friend, Dashaun Randolph, met Curtis Stroud, Roberts' brother, in Plainfield. Defendant Malcolm Bradley later arrived and began speaking with Scott, his cousin.

Defendant and Stroud began an argument which culminated in a shooting later that night when a rented Toyota driven by defendant pulled up at a stoplight next to an Acura in which Stroud was a back-seat passenger. Words were again exchanged between the young men, and a gunshot was fired, hitting Stroud in the chest.

Stroud was driven to the hospital, where he was declared dead upon arrival. Roberts and Rudolph then went to Roberts' house where Roberts planned to retrieve guns and ammunition that he kept in the woods nearby. The following day, Roberts was arrested for carrying two guns. While in custody, Roberts told police defendant shot Stroud.

Scott spoke with the police on March 24. While sober, she initially lied to Sergeant Michael Triarsi, stating she did not know who shot Stroud, but later identified defendant as the shooter.

Defendant was indicted on four charges: (1) first-degree murder, N.J.S.A. 2C:11-3(a)(1) and/or (2); (2) second-degree unlawful possession of a weapon,

N.J.S.A. 2C:39-5(b); (3) second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and (4) third-degree criminal restraint, N.J.S.A. 2C:13-2.

Defendant's first trial ended in a mistrial due to a hung jury. Defendant was retried on all counts from November 4 to November 23, 2015.

During the second trial, Scott was called as a witness and testified to habitually using phencyclidine (PCP), including on the night of the incident. She also testified that her cousin, Zakia Dixon, called the police after she told Dixon about the shooting. Triarsi's investigation report, however, stated Dixon had told the police she did not call them. Her memory was called into question in a Gross¹ hearing due to her detailed recollection of the events leading up to the shooting and loss of memory immediately afterward. Triarsi also testified at the Gross hearing. Defendant attested to Triarsi's presence in the courtroom throughout the trial.

After the jury spent "a day and part of a second day" deliberating, with part of that time involving video replays and testimony read backs, it stated it could not reach a unanimous decision. After defendant moved for mistrial, the

¹ In accordance with State v. Gross, 121 N.J. 1 (1990), a hearing to determine the reliability of a prior recorded statement taken by the detective.

court declined the request citing the short period of the deliberations and the complexity of the case. Instead, it ordered the jury to continue deliberations the following Monday.

Upon following the court's directive, the jury found defendant guilty of first-degree murder, second-degree possession of a firearm for an unlawful purpose, and third-degree criminal restraint. Defendant was later sentenced to an aggregate prison term of forty-two years, subject to an eighty-five percent period of parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2, and to a concurrent four-year term on his criminal restraint charge.

Defendant filed a direct appeal, alleging the trial court erred in: (1) denying his motion to suppress because the police unlawfully entered a third-party's residence to execute their arrest warrant; (2) allowing the testimony of a detective, who was not an expert witness, regarding a trajectory rod; and (3) failing to give an unrequested jury charge on third-party guilt. We affirmed defendant's conviction, State v. Bradley, No. A-3707-15 (App. Div. Sept. 28, 2018), and the Supreme Court denied his petition for certification, 237 N.J. 318 (2019).

Defendant timely filed for PCR and, after hearing oral argument, the PCR court entered an order dismissing his petition without an evidentiary hearing for reasons detailed from the bench, which are discussed below.

II.

In addressing an ineffective assistance claim, this court follows the two-pronged standard formulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984). "First, the defendant must show that counsel's performance was deficient." State v. Gideon, 244 N.J. 538, 550 (2021) (quoting Strickland, 466 U.S. at 687). The test is whether "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. "Second, the defendant must have been prejudiced by counsel's deficient performance." Gideon, 244 N.J. at 550 (citing Strickland, 466 U.S. at 687). To prove this element, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. It is permissible to examine the second prong first and, based on that determination, adjudicate the case without ruling on the deficiency of counsel's performance. See State v. Gaitan, 209 N.J. 339, 350 (2012). Finally, the Strickland test is also applied to claims of ineffective assistance of appellate counsel. State v. Morrison, 215 N.J. Super. 540, 546 (App. Div. 1987).

A court reviewing a PCR petition based on claims of ineffective assistance has the discretion to grant an evidentiary hearing if a defendant establishes a prima facie showing in support of the requested relief. State v. Preciose, 129 N.J. 451, 462 (1992). The mere raising of a claim for PCR does not entitle a defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). The court should only conduct a hearing if there are disputed issues as to material facts regarding entitlement to PCR that cannot be resolved based on the existing record. State v. Porter, 216 N.J. 343, 354 (2013).

"[W]here a . . . court does not hold an evidentiary hearing . . . [we] may exercise de novo review over the factual inferences drawn from the documentary record by the . . . court." State v. Harris, 181 N.J. 391, 421 (2004) (citing Zettlemoyer v. Fulcomer, 923 F.2d 284, 291 n.5 (3d Cir. 1991)). A PCR court's interpretation of the law is reviewed de novo. State v. Nash, 212 N.J. 518, 540-41 (2013).

III.

A. Trial Counsel's Decision Not to Call Dixon as a Witness

Defendant argues Scott's testimony was a critical part of the State's case and, given its importance, trial counsel was ineffective for not calling Dixon to undermine Scott's credibility. Defendant argues the PCR court did not properly

consider the importance of witness credibility, noting Scott provided multiple inconsistent statements and did not see who shot Stroud. Defendant contends Dixon's testimony could have further impeached Scott and swayed the jury into believing her testimony was false.

The PCR court found that defendant's trial counsel was not deficient for failing to call Dixon as a witness because it was a reasonable trial decision. The court noted defendant did not explain what exculpatory evidence her testimony would have provided; rather, he simply stated her testimony would have contradicted Scott's testimony concerning who called the police. We agree.

Defense counsel's "decision concerning which witnesses to call to the stand is 'an art,' and a court's review of such a decision should be 'highly deferential.'" State v. Arthur, 184 N.J. 307, 321 (2005) (citation omitted) (quoting Strickland, 466 U.S. at 689, 693). Counsel considered Dixon as a potential witness but deemed her potentially uncooperative. Moreover, counsel attacked Scott's credibility by calling Plainfield Police Sergeant Frederick Walz as a witness who testified the police received no civilian calls of shots being fired from March 15 to March 17, 2011. Walz's testimony directly controverted Scott's statement that Dixon called the police to report Stroud's shooting. As a result, counsel's decision not to call Dixon did not fall below the objective

reasonableness standard, and it was not prejudicial because Scott's testimony about calling the police was still disproven and her credibility impeached.

B. Trial Counsel's Decision Not to Provide Expert Witness Testimony on or Request the Court Take Judicial Notice of PCP's Effect on Memory

Defendant argues trial counsel was ineffective for not requesting the court to take judicial notice of PCP's effect on memory—information which is easily obtainable—due to Scott's habitual usage, including on the night of the incident. Furthermore, defendant, citing to State v. Savage, 120 N.J. 594 (1990), maintains competent counsel would have sought expert testimony to "ensure the jury understood the implications of Scott's drug usage."

The PCR court correctly held trial counsel's decision was not unreasonable because the issue of PCP affecting Scott's memory was adequately presented through her testimony, and counsel strategically used her testimony itself to support defendant's argument. Scott testified that she became delusional and experienced hallucinations, paranoia, and confusion when she used PCP. She also admitted to using PCP the night of Stroud's death and prior to her first statement to Triarsi. Moreover, the trial court conducted a Gross hearing and ruled that Scott feigned her memory loss concerning the events after the shooting. Given these facts, trial counsel's decision not to further highlight her memory loss did not fall below the objective standard of reasonableness because

her credibility and reliability were already impeached. As such, further damaging her credibility was unlikely to have effect the outcome of defendant's trial, so counsel's decision was not prejudicial.

C. Trial Counsel's Decision Not to Cross-Examine Scott Concerning Her Change of Story After Being Interviewed by Police on March 24, 2011

Defendant asserts trial counsel failed to highlight that Scott changed her story after an unrecorded break in her statement to the police. Defendant contends Scott's story change is particularly relevant because, prior to the break, she denied the incriminating claims she later made about defendant. Defendant argues State v. Caraballo, 330 N.J. Super. 559, 560-61 (App. Div. 2000), demonstrates that this court will reverse a defendant's conviction where trial counsel failed to adequately cross-examine the State's witnesses. Defendant maintains Scott's credibility would have been further undermined if counsel had adequately cross-examined her.

The PCR court correctly found trial counsel was not ineffective because Scott's story change was presented to the jury, and there was no evidence to support the assertion that Scott changed her story to the police after a break in their discussion. Defendant's trial counsel adequately cross-examined Scott and strategically decided not to question her about her story change. Defendant recognized the cross-examination of Scott's inconsistent statements to the police

and only challenges her failure to mention Scott's story change. Triarsi, however, testified that Scott was initially reluctant to implicate defendant in Stroud's death because she was afraid of him. She changed her mind after the police assured her that she would be safe. Therefore, it was objectively reasonable for trial counsel to question Scott on her inconsistent statements but not draw attention to why she changed her story.

D. Trial Counsel's Failure to Request a Sequestration Order for Triarsi

Defendant contends trial counsel should have moved to have Triarsi sequestered once Scott's memory was in dispute because he had the opportunity to listen to her testimony and shape his testimony accordingly. Defendant maintains the failure to sequester Triarsi was prejudicial because Scott's credibility was in question, in part, due to Triarsi's testimony contradicting Scott.

The PCR court correctly held defendant failed to demonstrate how not requesting a sequestration order fell below the objective standard of reasonableness or how a sequestration order would have changed the outcome of his trial. Defendant's argument is unavailing because he does not explain how Triarsi's presence in the courtroom had a prejudicial effect. The trial court's decision that Scott's memory loss was feigned was primarily based on Scott's

testimony, not Triarsi's. Furthermore, Triarsi testified before Scott at the Gross hearing and, as the PCR court noted, his testimony was relatively narrow in scope and unlikely to be influenced by other witnesses. Defendant also does not indicate which part of Triarsi's testimony was tainted—he simply points out a contradiction between Scott's and Triarsi's statements. Therefore, defendant failed to prove Triarsi's presence in the courtroom had any prejudicial effect.

E. Trial Counsel's Decision Not to Request a Third-Party Guilt Charge

Defendant argues trial counsel was ineffective for failing to ask for a third-party guilt jury instruction because his principal defense at trial was that Roberts accidentally killed Stroud. Defendant asserts the PCR court improperly rejected this claim by relying on this court's ruling that the trial court did not err when it failed to give a third-party guilt jury instruction sua sponte.

The PCR court correctly found the absence of a third-party guilt instruction was not prejudicial, pointing to our denial of direct appeal and stating there was no evidence such an instruction was "needed . . . to defuse some misimpression injected into the case." Bradley, slip op. at 47.

We agree and note this court also found "[t]he prosecutor did not suggest in summations or otherwise that the defense had a burden to prove that Roberts, rather than defendant, shot the victim, or that defendant was not allowed to rely

on evidence from the State's case in chief to support such an alternative theory[,] which defendant does not contest. Ibid. Although defendant attempts to reframe his argument as ineffective assistance, the nature of the third-party guilt instruction—specifically, its reinforcement of general jury instructions—means that its exclusion will only be prejudicial if some improper statement was made to the jury to taint their instruction. With the general jury instructions being properly given, the third-party guilt instruction was unnecessary, and its exclusion was not prejudicial.

F. The Cumulative Effect of Trial Counsel's Errors

Defendant contends the cumulative effect of all the aforementioned errors deprived him of effective legal representation. Given the PCR court found defendant's ineffective assistance arguments unpersuasive, it rejected this argument. Because we also conclude none of defendant's arguments have merit, we likewise reject this contention.

G. Appellate Counsel's Decision Not to Raise the Trial Court's Refusal to Grant a Mistrial When the Jury Stated They Could Not Reach a Verdict

Defendant asserts he was prejudiced when his appellate counsel did not raise the trial court's clear error in failing to properly give the jury a Czachor²

² State v. Czachor, 82 N.J. 392 (1980).

instruction, especially given the jury in his second trial, as in the first trial, state it could not reach a unanimous verdict.

The PCR court correctly found it was within the trial court's discretion to allow the jury to continue deliberating without a Czachor charge³ because the jury only deliberated for about a day and a half after a complex, two-week trial. Furthermore, the PCR court correctly held defendant's appellate counsel made a strategic decision not to pursue the issue, and defendant had not shown this argument would have been successful.

The trial court did not abuse its discretion in allowing the jury to continue deliberations without a Czachor charge. See Czachor, 82 N.J. at 405-07 (the decision to use a Czachor charge repeatedly "should be guided in the exercise of sound discretion by such factors as the length and complexity of trial and the

³ The charge is given to the jury when the court is informed they may be deadlocked. See State v. Ross, 218 N.J. 130, 143-45 (2014); State v. Figueroa, 190 N.J. 219, 231-39 (2007). Usually, upon being so notified, a court will charge the jury in accordance with the Model Jury Charge (Criminal), "Judge's Inquiry When Jury Reports Inability to Reach Verdict" (2013), as follows:

You have indicated that your deliberations have reached an impasse. Do you feel that further deliberations will be beneficial, or do you feel that you have reached a point at which further deliberations would be futile? Please return to the jury room to confer, and advise me of your decision in another note.

quality and duration of the jury's deliberations"). The trial court included a Czachor charge in its initial jury instructions. After the jury stated it could not reach a unanimous decision, the court's decision to request it continue deliberations was within the court's discretion. The murder trial was complex, covering two weeks, requiring a Gross hearing, involving eighteen witnesses with much conflicting testimony, and sixty-five exhibits. Furthermore, the jury only spent a day and a half deliberating, with a fair portion of that time being dedicated to playbacks and readbacks. As a result, the trial court did not abuse its discretion, and appellate counsel cannot be faulted for arguing an unsuccessful claim. See State v. Worlock, 117 N.J. 596, 625 (1990).

H. Defendant's Right to an Evidentiary Hearing

Defendant argues that because he demonstrated he was denied effective assistance of both trial and appellate counsel by a preponderance of the evidence, he is entitled to an evidentiary hearing. Defendant also asserts there is nothing in the State's brief which "undermines the need for an evidentiary hearing" because "there remain genuine issues of material fact in dispute."

The PCR court correctly held that defendant did not establish an ineffective assistance of trial or appellate counsel claim with a reasonable

likelihood of success and, in turn, is not entitled to an evidentiary hearing. See
R. 3:22-10(b). Given we have rejected all of defendant's claims, we agree.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION