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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1750-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

IVERY BRINSON, a/k/a
SHAKIL JOHNSON,

Defendant-Appellant.

Submitted May 8, 2023 – Decided May 24, 2023

Before Judges Whipple, Mawla and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 14-05-1420.

Joseph E. Krakora, Public Defender, attorney for appellant (Ruth E. Hunter, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Adam D. Klein, Deputy Attorney General, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Ivery Brinson appeals from a February 1, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

We previously recounted the facts underlying defendant's conviction by a jury for first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); two counts of first-degree robbery, N.J.S.A. 2C:15-1; second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2; second-degree conspiracy to commit carjacking, N.J.S.A. 2C:5-2; first-degree carjacking, N.J.S.A. 2C:15-2; second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a). State v. Brinson, No. A-2124-17 (App. Div. Jan. 31, 2019) (slip op. at 1-6). We affirmed defendant's convictions and sentence, id. at 16, and the Supreme Court denied his petition for certification, State v. Brinson, 238 N.J. 496 (2019).

Defendant's trial lasted several days wherein the State presented testimony of thirteen witnesses, including and relevant here, the testimony of: J.A., the carjacking victim; defendant's cousins, L.C. and S.C., who helped police identify defendant; and Detective Frank Ricci of the Essex County Prosecutor's

Office (ECPO) Crime Scene Unit. The State adduced video and audio evidence from inside the convenience store where defendant shot and killed the owner. The jury also viewed video of the carjacking, from which the police had taken still photos that were released to the public. These photos prompted L.C. to contact the police and identify defendant and his accomplices. The State also played video for the jury which showed defendants abandoning the carjacked vehicle near a Newark Housing Authority building. L.C., also reviewing this video, was able to identify defendant and his accomplices.

The State presented Detective Ricci and another detective as expert witnesses in fingerprint comparison and analysis to explain how they processed the convenience store crime scene. Detective Ricci testified he reviewed the video to identify the surfaces defendants touched, which were later dusted for fingerprints. He recovered nineteen fingerprints, but none matched defendant's or his accomplices.

Defense counsel used this evidence to her advantage during summations, noting defendant's fingerprints were not recovered from the scene. During the prosecutor's summation, she too noted no fingerprints belonging to defendants were recovered, but emphasized to the jury that "this isn't a science case." The State's identification of defendant as one of the culprits was not based on

fingerprint evidence, rather the clear audio and video evidence recovered from the store, the videos recovered from the other locations, eyewitness testimony, and the cousins' testimonies.

L.C.'s testimony was critical to the State's case because she came forward after police released images of the crimes to the public and helped police identify defendant. She testified she knew defendant and one of his accomplices, her brother, all their lives. She knew the other two accomplices as well. L.C. identified defendant's physical attributes by pointing him out to the jury on the video. She also identified him by his voice, which was clearly captured on the convenience store video.

During L.C.'s cross-examination, defense counsel sought to undermine her credibility by exploring her relationship with defendant. The following colloquy took place:

[Defense counsel:] You indicated that you['re] cousins with [defendant] through your father's side, correct?

[L.C.:] Yes.

[Defense counsel:] You're not close with [defendant]?

[L.C.:] I'm close with [defendant]?

[Defense counsel:] You're not close with [defendant], correct?

[L.C.:] I'm not understanding what you're saying. I'm sorry.

[Defense counsel:] You're not in a friendly relationship with [defendant], correct?

[L.C.:] He's – that's my favorite cousin out of all the boys.

Defense counsel then ended L.C.'s cross-examination.

During summations, defense counsel addressed L.C. and S.C.'s motives for testifying. She argued as follows:

Then we get to the cousins. The cousins. And I know you must struggle with why? Why would two family members come in and testify against another? Well let's think about this. We all have family. Whether we're close to them or not. There's always issues. But in this case what was [their] motive[?] Why? They went to the police to try and help out their little brother. To try and bail him out of some problems, because they knew for sure it was him. And that's why they came in here. To help out their little brother. To give the State [defendant]. Look at that video. Look to see where the hands touched. Look to see if you see any scars or tattoos. Then say to yourself, well it was easy for the cousins to come in, because it does kind of look like [defendant]. The cousins didn't know that no scientific evidence would link [defendant]. The cousins didn't know that they would be proven wrong by science. They were there to help out their closest relative, their little brother. You know that [defendant] has other brothers, they told you that. Evaluate their testimony in that vacuum, and think to yourself about family relationships. And then say is it corroborated? Is it substantiated by any other facts?

In her summation, the prosecutor addressed witness credibility, including L.C.'s motive for testifying. She noted both L.C. and S.C. "were timid, they were nervous" about testifying. The prosecutor stated:

[A]s far as any motive . . . you heard what [L.C.] told you, that [defendant] used to be her favorite cousin. Where's the ax[e] to grind? What have you heard that would tell you that? What issues that they may have had? We can't speculate where there's nothing to indicate that we should be speculating as to something.

In September 2019, defendant filed a pro se PCR petition, which PCR counsel later supplemented, raising six claims of ineffective assistance of trial counsel. Relevant to this appeal, PCR counsel argued trial counsel was ineffective because her cross-examination of L.C. was inadequate. Defendant asserted that during L.C.'s interview with police shortly after the crime, she told police she was afraid of defendant, and counsel failed to undermine the credibility of her testimony that defendant was her favorite cousin, by exploring what she told police.

Defendant argued trial counsel was also ineffective for failing to object to the portion of the prosecutor's summation regarding the fingerprint evidence. He alleged the prosecutor misinformed the jury there were no fingerprints recovered, which was not the case, and counsel failed to correct the record. Defendant also alleged among the fingerprints, there were prints of two

individuals with criminal records. He argued trial counsel was ineffective for not investigating these individuals and presenting evidence of third-party guilt at trial.

Defendant's pro se PCR brief alleged ineffective assistance of appellate counsel for not arguing prosecutorial misconduct when, during summation, the prosecutor commented on defendant's "demeanor/appearance by making comments about [his] note taking using his left hand, then turn[ed] around and comment[ed] about the person in the video shooting with his left hand." Defendant asserted this claim, along with the others raised in the pro se PCR brief,¹ necessitated an evidentiary hearing.

The trial judge was also the PCR judge. At oral argument of the PCR petition and in his written opinion, the judge noted he had received defendant's pro se brief. The judge's opinion thoroughly addressed each of the claims raised by PCR counsel.

¹ Defendant's pro se PCR brief also argued appellate counsel should also have argued prosecutorial misconduct because the prosecutor failed to tell the jury that L.C. initially told the ECPO she was afraid of defendant. His brief also asserted there was a discovery violation because the State failed to turn over two latent fingerprint tests conducted by Detective Ricci, which was "both favorable and material to [the] defense. This new evidence would have changed [defendant's] defense, [he] would have presented a third[-]party defense." We do not address these arguments because they have not been reasserted vis-à-vis the claims against appellate counsel in this appeal.

The PCR judge found trial counsel was not ineffective for failing to question L.C. about her alleged prior inconsistent statement because "the testimony that was elicited on cross-examination was far more favorable to [defendant] than her previous expressions of fear toward him." The judge concluded:

Trial [c]ounsel's decision was to leave the jury with the witness's affectionate comments about [defendant], rather than pursue a line of questioning that could have given the jury more reason to find [defendant] guilty by revealing [L.C.'s] fear of him. Indeed, bringing up her prior interview where she expressed fear of [defendant] and her statement that he had killed before, surely would not have benefitted [defendant,] but instead would likely have had a devastating effect upon the jury.

The judge found trial counsel was not ineffective for failing to investigate the fingerprint evidence. He stated:

[T]he [shooting] occurred at a convenience store, it is expected that there will be customers who leave behind fingerprints in the minutes, hours, and days before the incident. Thus, fingerprints recovered from the store are not particularly telling of guilt as perhaps they would be in a private dwelling. Indeed, footage played at the trial showed customers leaving who had been in the store immediately preceding the incident. [Defendant] does not specify where the prints were found in the store. It would also have been extremely difficult to prevail on this defense given the compelling evidence in this case against [defendant]. This included the very clear surveillance footage and audio presented

to the jury, the identification of . . . [defendant] by his two cousins who have known him all his life, and the identification by [J.A.] as to the subsequent carjacking that occurred minutes later, a short distance from the store. The evidence against . . . [defendant] herein was thus overwhelming.

The PCR judge found trial counsel was not ineffective for declining to object to the State's comments about the fingerprint evidence during summations because defendant did not "specify when the prosecutor made such a statement." Instead, the judge noted the prosecutor's statement no fingerprints were recovered belonging to defendant or his accomplices, was "somewhat favorable to" defendant.

The judge concluded defendant failed to show trial counsel prejudiced defendant or deprived him of a fair trial. This was because

even without the identification of three separate witnesses, the jury could have reached its verdict based on the surveillance footage alone. The footage captured the events . . . with remarkable clarity and provided almost insurmountable evidence against [defendant]. The video contained audio as well, and [defendant's] voice therein was identified by [L.C.]. In addition, other camera footage depicted the four individuals running towards [J.A.]'s home immediately before he was carjacked, while additional video surveillance from a housing complex showed the vehicle being abandoned there a short time later with four individuals exiting it. In each of these three separate videos, a man with khaki shorts is visible, [the] State argued that this man was . . . [defendant].

The PCR judge denied defendant's request for an evidentiary hearing because defendant failed to raise a prima facie claim of ineffective assistance of counsel. He concluded defendant's "claims [were] vague, conclusory, unsupported, and speculative."

On appeal, defendant raises the following points in his counseled brief:

I. THE PCR COURT ERRED IN DENYING DEFENDANT'S PCR PETITION WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING BECAUSE THE COURT'S FINDINGS WERE NOT BASED ON "OBJECTIVE EVIDENCE IN THE RECORD," AND INSTEAD, WERE IMPROPERLY BASED ON THE COURT'S CREDIBILITY DETERMINATIONS.

A. The PCR court's credibility determination regarding the allegation that trial counsel ineffectively cross-examined key State witness L.C. is owed no deference, particularly because the witness's prior inconsistency would have undermined the State's theory that L.C. was credible because she had no "ax[e] to grind."

B. The PCR court's factual finding that the State did not assert, contrary to defendant's PCR claims, that no fingerprints were found at the scene was inaccurate. In addition, the court's finding regarding defendant's fingerprint argument was pure speculation.

C. Deference is not owed the PCR court's finding that the evidence was "overwhelming" because it was not based on "objective evidence

in the record" but rather on the court's improper credibility determination.

II. THERE MUST BE A REMAND FOR THE TRIAL COURT TO CONSIDER PETITIONER'S UNADDRESSED PRO SE ARGUMENT. SEE R. 3:22-6(d); STATE V. WEBSTER, 187 N.J. 254, 258 (2006).

Defendant's pro se appellate brief raises the following points for our consideration:

[I.] THE PCR COURT ERRED IN DENYING DEFENDANT'S PCR PETITION WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING BECAUSE THE COURT'S FINDINGS WERE NOT BASED ON "OBJECTIVE" EVIDENCE IN THE RECORD, AND INSTEAD, WERE IMPROPERLY BASED ON THE COURT'S CREDIBILITY DETERMINATIONS.

SUBPOINT A: Trial counsel was ineffective for not adequately investigating the fingerprints lifted from the crime scene to support a third-party guilt defense.

SUBPOINT B: The standard for an evidentiary hearing has been met.

I.

Where a PCR judge does not hold an evidentiary hearing, we "conduct a de novo review of both the factual findings and legal conclusions of the PCR court." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (quoting State

v. Harris, 181 N.J. 391, 421 (2004)). However, "we review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157-58, cert. denied, 522 U.S. 850 (1997)).

II.

Ineffective assistance of counsel claims must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687-88 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 57-58 (1987). Under the first prong, a "defendant must show that counsel's performance was deficient" and counsel's errors were so egregious that they were "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The second prong requires a defendant to demonstrate the alleged defects prejudiced his right to a fair trial to the extent "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; Fritz, 105 N.J. at 60-61.

There is a strong presumption 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 (internal quotations omitted). 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. Cronic, 466 U.S. 648, 659 n.26 (1984).

A defendant seeking PCR must establish "by a preponderance of the credible evidence" they are entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). They must allege and articulate specific facts, which "provide the court with an adequate basis on which to rest its decision" State v. Pennington, 418 N.J. Super. 548, 553 (App. Div. 2011) (quoting State v. Mitchell, 126 N.J. 565, 579 (1992)). A 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).

Guided by these principles, we affirm substantially for the reasons expressed in the PCR judge's written opinion. We add the following comments.

The arguments raised in Point I of defendant's counseled and pro se briefs lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Trial counsel's handling of the witness testimony, summations, and the

fingerprint evidence was proper trial strategy. Defendant has not convinced us trial counsel's representation was either constitutionally defective or that it prejudiced defendant and the outcome of the trial. The PCR judge correctly concluded the evidence of defendant's guilt was "overwhelming."

III.

In Point II of his counseled brief, defendant argues the PCR judge failed to address the claims raised in his pro se PCR brief. Although the judge indicated he considered the brief, his opinion did not address the claims of ineffective assistance of appellate counsel.

As with trial counsel, a defendant is also entitled to effective assistance of appellate counsel, but "appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant." State v. Morrison, 215 N.J. Super. 540, 549 (App. Div. 1987) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel will not be found ineffective for failure to raise a meritless issue or error an appellate court would deem harmless. See State v. Echols, 199 N.J. 344, 361 (2009); Harris, 181 N.J. at 499; State v. Reyes, 140 N.J. 344, 365 (1995).

On the initial appeal, counsel raised five arguments on defendant's behalf. Brinson, slip op. at 2. Counsel challenged the jury charges on the felony murder,

robbery, and conspiracy to commit robbery convictions. Id. at 6. He argued the jury produced an inconsistent verdict by finding defendant guilty of aggravated manslaughter and not guilty of reckless manslaughter. Id. at 8. Counsel challenged the instruction the judge gave the jury on the unlawful purpose for possessing the gun offense. Id. at 10. And he contested defendant's sentence. Id. at 14.

Defendant argues appellate counsel should also have argued prosecutorial misconduct based on a comment she made about his left-handedness. We review this claim de novo.

The State's summation lasted over an hour. The prosecutor referenced the gamut of evidence the State had to prove defendant was the shooter in the convenience store and one of the carjackers, including the photographic and video evidence, eyewitness testimony, and testimony from defendant's cousins regarding his physical attributes. During her summation, the prosecutor referenced the video from the convenience store showing defendant holding the gun in his left hand. Later the prosecutor stated:

On the left you have the photograph of [defendant] inside that store in that cooler aisle, that was identified for you by both [L.C.] and [S.C.], inside of that store. Two people that know him his entire life. And on the right[,] you have the other photograph that was taken of him when he was arrested on July 9th of

2013. Take a look at the cut of their noses. Take a look at this tiny scar that you see in both of them over his eyebrow. Take a look too at those cheekbones. These are the same cheekbones that you see every single day. During the course of the trial you may have noticed the defendant taking notes using his left hand. You can see also in the video that the person that's doing the shooting is also using his left hand.

"Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." State v. Patterson, 435 N.J. Super. 498, 508 (App. Div. 2014) (quoting State v. R.B., 183 N.J. 308, 332 (2005)). Prosecutorial misconduct justifies reversal where the misconduct was so egregious as to deprive the defendant of a fair trial. State v. Smith, 167 N.J. 158, 181 (2001).

"In deciding whether prosecutorial conduct deprived a defendant of a fair trial, 'an appellate court must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred.'" State v. Williams, 244 N.J. 592, 608 (2021) (quoting State v. Frost, 158 N.J. 76, 83 (1999)). "Factors to be considered in making that decision include, '(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them.'" Ibid. (quoting Frost, 158 N.J. at 83). Reversal is

appropriate only where the prosecutor's actions are "clearly and unmistakably improper" to "deprive defendant of a fair trial." Patterson, 435 N.J. Super. at 508 (quoting State v. Wakefield, 190 N.J. 397, 437-38 (2007), cert. denied, 552 U.S. 1146 (2008)). "In reviewing closing arguments, we look, not to isolated remarks, but to the summation as a whole." State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008) (citing State v. Carter, 91 N.J. 86 (1982)).

Arguably, the prosecutor's comment constituted error because although she referenced the convenience store video, which was in evidence and showed the shooter was left-handed, there was no testimony defendant was left-handed. However, defense counsel did not object. The question for us is whether appellate counsel prejudiced defendant by failing to raise the issue on appeal and whether appellate counsel's omission affected the outcome of the appeal.

Given the totality of the summation, we are satisfied this single remark did not deprive defendant of a fair trial and was therefore harmless error. Indeed, the weight of the evidence proved defendant was the shooter, regardless of whether he was left or right-handed. Moreover, following summations, the judge instructed the jury as follows:

Regardless of what counsel said, or I may have said recalling the evidence in this case, it is your recollection of the evidence that should guide you as [j]udges of the facts. Arguments, statements, remarks,

openings, and summations of counsel are not evidence,
and must not be treated as evidence.

For these reasons, we conclude appellate counsel was not ineffective for
declining to raise this issue on appeal.

Affirmed.

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



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