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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2196-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID RICHARDSON,

Defendant-Appellant.

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Submitted December 7, 2022 – Decided January 12, 2023

Before Judges Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 10-10-0860.

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

Christine A. Hoffman, Acting Gloucester County Prosecutor, attorney for respondent (Jonathan I. Amira, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant David Richardson of aggravated sexual assault during the commission of a burglary, burglary, theft, possession of a weapon, and criminal mischief. In the second phase of his bifurcated trial, the jury found defendant guilty of contempt of a court order. The court imposed an aggregate thirty-one-and-a-half-year sentence, thirty years of which is subject to the requirements of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant appeals from an order denying his post-conviction relief (PCR) petition without an evidentiary hearing.[1] We affirm.

I.

The criminal charges against defendant arose from an alleged June 20, 2010 incident at the second floor Woodbury apartment of defendant's former girlfriend, B.M.[2] A grand jury returned an indictment charging defendant with: aggravated sexual assault while in possession of a weapon; aggravated

[1] The court's order also directed an amendment to defendant's judgment of conviction granting an award of gap time credit "from July 21, 2000 to February 25, 2011." The court's gap-time-credit award is not challenged on appeal, and we therefore do not address it other than to note we affirm that portion of the court's order.

[2] We employ initials to identify the alleged victim of the crimes and her friend, J.W., to protect the victim's privacy and because the identity of victims of alleged sexual assaults are not subject to public disclosure under Rule 1:38-3(c)(12).

sexual assault; sexual assault through force or coercion; aggravated assault; burglary while armed, displaying a deadly weapon, or inflicting bodily injury; criminal restraint; theft by unlawful taking; violation of a domestic violence restraining order; possession of a knife for an unlawful purpose; and criminal mischief. The court severed the violation-of-a-domestic-violence-restraining-order charge from the remaining nine charges for trial, and subsequently held a bifurcated trial. The first phase of the trial addressed the nine charges. During the second phase, the same jury decided the violation-of-a-domestic-violence-restraining-order charge.

The trial evidence showed B.M. dated defendant for about three years, but their relationship ended months prior to the June 20, 2010 incident. In fact, prior to the incident, B.M. had obtained a domestic violence restraining order against defendant. The order in part prohibited defendant from going to B.M.'s apartment.

J.W. is B.M.'s neighbor. J.W. lived in an apartment upstairs from B.M.'s apartment. At around 2:00 a.m. on June 20, 2010, J.W. was sleeping in her apartment when she heard banging at her door. When J.W. opened the door, B.M. collapsed into her arms. B.M. was naked from the waist down and, according to J.W., B.M. was shaking, appeared terrified, and repeatedly said,

"he had raped her." B.M. rebuffed J.W.'s suggestions they call the police and asked instead that J.W. call B.M.'s mother. When she could not reach B.M.'s mother, J.W. called the police.

After the police arrived, J.W. went into B.M.'s apartment to obtain clothes and shoes for B.M. While in the apartment, J.W. observed it was in "disarray," and there was a "huge hole" in the bedroom wall that extended almost into the adjacent apartment. J.W. also noticed the sheets had been pulled off B.M.'s bed.

The police took B.M. to the hospital where she was examined by a sexual assault nurse examiner who collected vaginal and cervical swabs from B.M. and photographed her injuries. B.M. was discharged from the hospital at around 8:00 a.m. and two days later provided a videotaped statement to the police about the incident.[3]

B.M. testified she locked her apartment's doors and windows prior to going to bed on the evening of June 19, 2010. In the early morning hours of June 20, 2010, she heard a door open and saw defendant standing over her bed. She told defendant to leave her apartment and started screaming. B.M. testified defendant put his hand over her mouth and they physically struggled

[3] The videotaped recording was not introduced into evidence at trial.

as defendant attempted to take her cell phone. According to B.M., she kicked a hole in the bedroom wall during the struggle. B.M. explained defendant took her cell phone and looked through it while placing his hand over her mouth. B.M. testified defendant became angry when he saw another man's photograph on her cellphone.

B.M. further testified defendant then removed her clothes, forcibly penetrated her vagina with his penis and ejaculated, and repeatedly told her to stop screaming. Defendant then walked B.M. to the bathroom and forced her to take a shower. Following the shower, defendant took B.M. to the kitchen, where he lifted her onto a table, held her down, and again vaginally penetrated her with his penis and ejaculated.

B.M. also explained defendant then took her back to the bedroom, where he head-butted her and struck her in the face with a closed fist, causing her lip to bleed. Defendant next brought B.M. to the living room where her laptop computer was located. B.M. testified that defendant, while armed with a knife he obtained from the kitchen, threatened to kill her unless she provided the passwords to her email and Facebook accounts. B.M. provided the passwords, defendant gained access to the accounts, and he became enraged after viewing her emails and Facebook posts. Defendant then cut holes in B.M.'s furniture

with the knife and opened B.M.'s purse, from which he took approximately $2,000 in cash.[4]

Defendant forced B.M. to return to her bedroom. He paced around B.M.'s living room until he heard her neighbor, J.W., returning to her apartment. According to B.M., defendant then left B.M.'s apartment through its back door. After defendant left, B.M. ran to J.W.'s apartment where, as noted, she collapsed into B.M.'s arms and later J.W. called the police.

The police did not find any evidence of a forced entry into B.M.'s apartment, but they observed knife slashes on the living room furniture; blood on a pillow, a doorframe, the kitchen floor, and a kitchen cabinet; and a hole in the bedroom wall. Medical personnel at the hospital determined B.M.'s injuries included a "reddened area" on her face, "some swelling," and a "reddened area [on] her bottom lip."

Defendant was arrested at around 6:45 a.m. on June 20, 2010. He was in possession of $1,652 in cash at the time of his arrest.

Erol Azanli, a New Jersey State Police forensic specialist, testified a comparison of DNA found in the vaginal and cervical swabs taken from B.M.,

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[4] B.M. testified the cash was in two separate envelopes, one containing cash from an insurance claim and the other containing tips from her bartending job.

and from a buccal swab obtained from defendant, established defendant was the source of the major DNA profile from the vaginal and cervical swabs.

B.M. testified defendant did not allow her to use her cell phone during the five-and-a-half hours he was in her apartment. She also testified the residents of the apartment adjacent to the bedroom wall in which she kicked the hole were home during the incident, and, despite her screaming, they did not call the police. B.M. further testified there was a refrigerator partially blocking the window through which she claims defendant gained entry into her apartment.

Confronted by defendant's trial counsel with evidence showing ten text messages had been sent from her phone during the incident, B.M. testified defendant must have sent them. The evidence also showed ten text messages had been sent from B.M.'s phone to defendant during the three days prior to the incident. Defendant's trial counsel also established during cross-examination of B.M. and the police witnesses that there was no evidence of a forced entry into B.M.'s apartment, and B.M.'s description of a five-and-a-half-hour violent incident was inconsistent with B.M.'s observable injuries.

Defendant presented the testimony of Kathleen Brown, a nurse and expert in sexual assault nurse examiner protocols, sexual assault response

teams, and the detection of injuries. Brown opined B.M.'s minimal physical injuries were inconsistent with the degree of force and actions B.M. attributed to defendant.

The jury found defendant not guilty of aggravated sexual assault with a weapon, aggravated assault, and criminal restraint. The jury found defendant guilty of aggravated sexual assault during the commission of a burglary, sexual assault through force or coercion, simple assault, burglary, theft, possession of a knife for an unlawful purpose, criminal mischief, and false imprisonment. In the second phase of the bifurcated trial, the jury found defendant guilty of contempt of the domestic violence restraining order. As noted, the court imposed an aggregate thirty-one-and-a-half-year sentence, thirty years of which are subject to NERA. The court entered defendant's judgment of conviction on May 10, 2013.

We affirmed defendant's convictions on his direct appeal and remanded for an amendment to the judgment of conviction and for reconsideration of the amount of the Sex Crime Victim Treatment Fund penalty, see N.J.S.A. 2C:14-10. State v. Richardson, No. A-5810-12 (App. Div. July 12, 2017) (slip op. at 38). The Supreme Court denied defendant's petition for certification. State v. Richardson, 231 N.J. 550 (2017).

On March 16, 2018, defendant filed a pro se PCR petition. Defendant generally alleged his trial and appellate counsel were ineffective, and he also claimed the trial court erred by suggesting it would increase his sentence if he "kept acting out and refusing court." Following the assignment of counsel, defendant filed a supplemental verified PCR petition alleging he was denied the effective assistance of trial and appellate counsel for the reasons set forth in his pro se brief and his PCR counsel's brief. Defendant also alleged his trial counsel was ineffective by failing to retain an expert to investigate the locking mechanism of the window to B.M.'s apartment. Defendant contended an expert would explain the locking mechanism prevented the window from opening sufficiently to allow defendant entry through the window as B.M. alleged.

Following argument on the petition, Judge Mary Beth Kramer issued a detailed and thorough fifty-five-page opinion detailing defendant's arguments that his trial and appellate counsel were ineffective and the trial court otherwise deprived him of his constitutional rights. More particularly, the court rejected defendant's claims his trial counsel was ineffective by failing to object to allegedly prejudicial testimony elicited from defendant's expert witness, Kathleen Brown, and by failing to retain an expert to testify

concerning the purported broken lock on a window B.M. claimed defendant used to enter her apartment.

The court also determined defendant failed to establish his appellate counsel was ineffective by: failing to argue on direct appeal the trial court erred by failing to provide a Clawans[5] charge; failing to challenge unduly prejudicial testimony elicited from defendant's expert Brown; and failing to argue on direct appeal the court erred by imposing a consecutive sentence on defendant's conviction for violating the domestic violence restraining order.

The PCR court further rejected defendant's claim the trial court violated his constitutional right to self-representation, imposed an illegal sentence by failing to award gap time credit, and erred by imposing a Sex Crime Victim Treatment Fund penalty without conducting a hearing. The PCR court, however, determined the sentencing court erred by failing to grant defendant gap time credit from July 21, 2000 to February 25, 2011, and the PCR court directed the entry of an amended judgment of conviction awarding the gap time credit.

The court entered an order denying defendant's PCR petition without an evidentiary hearing and awarding defendant gap time credit. This appeal

[5] State v. Clawans, 38 N.J. 162 (1962).

followed. On appeal, defendant presents the following arguments for our consideration:

> POINT I
>
> DEFENDANT'S CONVICTIONS MUST BE REVERSED BECAUSE HE WAS DENIED HIS CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION.
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> POINT II
>
> THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL AND APPELLATE COUNSELS' INEFFECTIVENESS.
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> A. Trial and Appellate Counsel Failed to Pursue the Unduly Prejudicial Cross-Examination of Dr. Kathleen Brown.
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> B. Appellate Counsel Failed to Pursue the Trial Court's Not Providing the Clawans Charge to the Jury.
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> C. Trial Counsel Failed to Investigate a Lock Expert, Which Would Have Discredited the Alleged Victim's Credibility and Supported the Consensual Defense.

II.

Defendant claims the PCR court erred by rejecting his claims that his trial and appellate counsel were ineffective. He also asserts the court erred by

denying his ineffective-assistance-of-counsel claims without an evidentiary hearing.

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 effective assistance of counsel." State v. Nash, 212 N.J. 518, 541 (2013) (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). In Strickland, the Court established a two-part test, later adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), as the standard applicable under the New Jersey Constitution, 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. Ibid. A petitioner must demonstrate 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 of the Strickland standard, 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 693-94). A petitioner must demonstrate "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. "The error committed must be so serious as to undermine the court's confidence in the jury's verdict or result reached." State v. Chew, 179 N.J. 186, 204 (2004) (citing Strickland, 466 U.S. at 694).

"The right to effective assistance includes the right to the effective assistance of appellate counsel on direct appeal." State v. O'Neil, 219 N.J. 598, 610-11 (2014); accord State v. Guzman, 313 N.J. Super. 363, 374 (App. Div. 1998); see also State v. Morrison, 215 N.J. Super. 540, 545 (App. Div. 1987) (citing Evitts v. Lucey, 469 U.S. 387 (1985)) ("[D]ue process guarantees a criminal defendant effective assistance of counsel on a first appeal as of right"). We apply the Strickland standard to determine an ineffective assistance of appellate counsel claim. State v. Harris, 181 N.J. 391, 518 (2004); Morrison, 215 N.J. Super. at 546.

An appellate court reviews the legal conclusions of a PCR court de novo. Harris, 181 N.J. at 419 (citing Manalapan Realty, L.P. 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. 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.

A.

We first address defendant's argument his trial counsel was ineffective by failing to object to certain testimony of his expert Kathleen Brown elicited during the State's cross-examination, and his appellate counsel was ineffective by failing to challenge the admission of the testimony on direct appeal. More particularly, defendant claims counsel erred by failing to challenge the admission of Brown's testimony concerning when consent to a sexual act is withdrawn or negated and when consent to a sexual act is "not freely given" because it is the product of manipulation and control. Defendant further claims counsel failed to argue Brown's testimony constituted an improper "implicit[]" opinion that "[he] was guilty of the [charged] offenses" and the challenged testimony denigrated his defense that B.M. consented to his penetration of her vagina.

Defendant claims Brown implicitly opined defendant is guilty of the offenses because Brown testified "control leads to a victim being manipulated

and thus consent is not freely given," "weapons, force, verbal abuse and threats would be forms of control, which would not allow for consent to be freely given," and "a sexual assault occurs between those knowing each other." Defendant's attempt to weave together different aspects of Brown's testimony on cross-examination into a purported implicit opinion that defendant is guilty of the offenses charged finds no support in the record.

Defendant ignores that during her direct testimony, and again on cross-examination, Brown opined B.M. did not suffer any injuries consistent with her claims defendant physically assaulted her during the more-than-five-hour incident she alleged occurred. Brown's testimony refuted B.M.'s claim she was physically assaulted and therefore supported defendant's defense by undermining B.M.'s version of the events and her credibility as a witness.

In addition, during her direct examination, Brown testified she could not opine as to whether a sexual assault was committed based on a sexual assault nurse examiner's "subjective and . . . objective" findings during an examination of an alleged victim. Brown explained she therefore could not offer an opinion as to whether a sexual assault occurred during the June 20, 2010 incident, stating: "I don't know what happened." Brown also explained "[w]hat [she was] saying is that the degree of force that [B.M.] is describing, the punching

with the closed fist, the being held down, the hand over the mouth . . . The kind of violence that [B.M.]'s describing doesn't seem consistent . . . with the varying minimal injury that [B.M.] has."

Contrary to defendant's contention, Brown did not offer a different opinion on cross-examination, and she did not implicitly opine defendant was guilty or undermine his defense of consent. Instead, on cross-examination, Brown did little more than explain the collection of DNA by sexual assault nurse examiners has proven helpful where the alleged sexual assault is committed by a stranger to the victim because the DNA allows for later identification of the assailant.

Brown further explained collection of DNA where the alleged sexual assault is committed by someone known to the alleged victim "is not very helpful" because "[y]ou would expect that there would be DNA there" because "[t]hese people have consensual sex at times." That testimony supports, and does not undermine, defendant's defense. It provides an expert opinion minimizing the DNA evidence the State presented against defendant by explaining DNA evidence is what you would expect to find where two people known to each other — like defendant and B.M. — have consensual sex.

Brown also opined that where DNA confirms the identity of an individual accused of sexual assault, "a common strategy" is for the individual to "say . . . the sex was consensual." Defendant argues Brown's suggestion consent is a "common strategy" undermined and denigrated his defense that his vaginal penetration of B.M. was consensual.

We agree Brown could have employed a different, more neutral phrase to describe the assertion of the defense of consent where DNA confirms the accused sexually penetrated an alleged victim. We also agree Brown's expression of an opinion on the assertion of the defense of consent fell beyond the areas of expertise for which the court qualified her as a witness. See State v. J.Q., 252 N.J. Super. 11, 25 (App. Div. 1991) (citing State v. Zola, 112 N.J. 384, 423 (1988)) ("After being qualified as an expert, the witness is limited to testimony which is squarely within the area of expertise."). However, admission of the testimony was not clearly capable of producing an unjust result at trial, see R. 2:10-2, when considered in the context in which the statement was made, and the testimony did not deprive defendant of a fair trial.

Brown offered the testimony as part of her explanation of the significance of DNA evidence in what she described as the typical sexual assault case — one where only the alleged victim and accused are present

during the commission of the alleged crime. She explained the accused may, as a matter of fact, "think[]" the "sex was consensual" and, because "there's no one there to validate" whether that is the case, determining whether or not there was consent is "difficult." Thus, Brown did not denigrate the defense of consent or suggest defendant committed the offenses charged. She explained only that the assertion of the defense of consent where there are no witnesses present and DNA evidence confirms "sex" between the accused and the alleged victim occurred presents a "difficult" determination, presumably for the jury, as to whether the accused committed a charged sexual assault. In our view, that testimony supports defendant's defense at trial that the State did not sustain its burden of proving the charged offenses beyond a reasonable doubt.

Defendant also argues counsel should have challenged Brown's cross-examination testimony that an individual may commit a sexual assault by exercising physical control or other manipulation over the alleged victim. We find the testimony unremarkable and discern no error in its admission that would have supported a proper objection at trial or the basis for a challenge on direct appeal. Moreover, defendant makes no showing admission of the testimony was clearly capable of producing an unjust result, R. 2:10-2, deprived him of a fair trial, or that there is a reasonable probability that but for

counsels' failures to challenge its admission, the result of either the trial or direct appeal would have been different, see Strickland, 466 U.S. at 694.

In sum, we are convinced the PCR court correctly rejected defendant's claims trial counsel was ineffective by failing to object to Brown's challenged testimony and appellate counsel was ineffective by failing to argue on appeal the testimony was admitted in error or constituted an error requiring reversal of his convictions. Defendant's counsels' performance was not deficient under the first prong of the Strickland standard by failing to make meritless arguments. State v. Worlock, 117 N.J. 596, 625 (1990). Additionally, even assuming either trial or appellate counsel erred by failing to challenge admission of the testimony, defendant makes no showing that but for counsels' alleged errors there is a reasonable probability the result of the trial or direct appeal would have been different, Strickland, 466 U.S. at 694, and our independent review of the record confirms defendant suffered no prejudice under Strickland's second prong as a result of counsel's purported errors.

B.

We are also unpersuaded by defendant's claim the PCR court erred by finding he did not establish a prima facie claim appellate counsel was ineffective by failing to argue on direct appeal the court erred by rejecting

defendant's request for a Clawans charge. Trial counsel sought a Clawans charge founded on the State's failure to call as witnesses the residents of the apartment contiguous to the wall in B.M.'s bedroom into which she kicked the hole during her physical struggle with defendant. The trial court rejected defendant's request for the charge, finding it was not warranted based on the circumstances presented.

In Clawans, the Court established "when it would be appropriate to allow one party to urge a jury to draw an adverse inference against an opposing party for the failure to call an available witness." State v. Hill, 199 N.J. 545, 559 (2009) (citing Clawans, 38 N.J. at 170-72). The adverse inference charge permitted under Clawans is based on the notion that the "failure of a party to produce before a trial tribunal proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him." Clawans, 38 N.J. at 170.

To determine whether an adverse inference charge is appropriate under Clawans, a court must consider "all relevant circumstances" and make findings as to four factors:

> (1) that the uncalled witness is peculiarly within the control or power of only the one party, or that there is

> a special relationship between the party and the witness or the party has superior knowledge of the identity of the witness or of the testimony the witness might be expected to give; (2) that the witness is available to that party both practically and physically; (3) that the testimony of the uncalled witness will elucidate relevant and critical facts in issue [;] and (4) that such testimony appears to be superior to that already utilized in respect to the fact to be proven.
>
> [Hill, 199 N.J. at 561-62 (alteration in original) (quoting State v. Hickman, 204 N.J. Super. 409, 414 (App. Div. 1985)).]

Here, defendant failed to make any showing in support of his PCR petition that based on the circumstances and factors pertinent to whether a Clawans charge should be given, the trial court erred by denying his request for the charge. For example, as the PCR court found, defendant presented no evidence the residents of the apartment adjacent to B.M.'s bedroom wall were peculiarly within the control or power of the State or that the State had superior knowledge of their identity or their putative testimony. Indeed, the evidence showed the police never identified or interviewed the residents. Moreover, defendant made no showing the residents were available practically and physically to the State or that the residents' testimony would have been "superior to that already utilized in respect to the fact to be proven." Ibid.

Stated differently, defendant did not establish any basis supporting a determination the trial court erred by denying his request for the Clawans charge and, in that failure, defendant did not sustain his burden of demonstrating appellate counsel's performance was deficient under Strickland's first prong by not arguing on direct appeal the court erred by denying trial counsel's request for the charge. As we have explained, counsel is not deficient by failing to make a meritless argument. Worlock, 117 N.J. at 625.

For the same reasons, defendant failed to satisfy his burden under Strickland's second prong. That is, because defendant did not establish appellate counsel's performance was deficient, he could not, and did not, establish that but for the alleged error in failing to challenge on direct appeal the trial court's refusal to give a Clawans charge, there is a reasonable probability the result of the direct appeal would have been different. See Strickland, 466 U.S. at 694; Gideon, 244 N.J. at 551. Indeed, to sustain a successful challenge on direct appeal to the court's denial of defendant's request for the Clawans charge, defendant would have been required to demonstrate the court abused its discretion. State v. Dabas, 215 N.J. 114, 132

(2013). Based on our review of the trial record, we find no basis supporting such a determination here.

C.

Defendant also contends the PCR court erred by rejecting his claim trial counsel was ineffective by failing to investigate the retention of a lock expert. Defendant contends a lock expert was required to explain the window through which B.M. claimed defendant entered her apartment could not have been opened sufficiently to allow his entry. In defendant's supplemental verified PCR petition, he claimed he urged trial counsel on numerous occasions to have the window's locking mechanism investigated in support of his contention the window could not be opened sufficiently to allow his entry. The PCR court rejected defendant's contentions, finding defendant failed to present adequate evidence establishing a prima facie ineffective-assistance-of-trial-counsel claim under the Strickland standard. We agree.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Porter, 216 N.J. 343, 353 (2013) (quoting Chew, 179 N.J. at 217). Therefore, "[a]n ineffective assistance of counsel claim may occur when counsel fails to conduct an adequate pre-trial investigation." Id. at 352.

Where, as here, 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 based 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 his supplemental verified petition, defendants asserts in conclusory fashion an expert witness would have supported his claim the locking mechanism did not allow the window to open sufficiently to permit defendant's entry into B.M.'s apartment, but defendant did not present any 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 otherwise offered to trial counsel that would have assisted in defending against the charges. See Porter, 216 N.J. at 352-53.

Defendant did not present any evidence establishing that an investigation into obtaining expert testimony on the window's locking mechanism would have yielded competent proof undermining B.M.'s testimony concerning defendant's entry into her apartment or otherwise supporting his defense. As we have explained, 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. Defendant failed to sustain that burden here. And trial counsel's performance was not deficient by failing to conduct an investigation that would not have yielded evidence supporting a defense or undermining the State's case. Cf. Worlock, 117 N.J. at 625 (citing Strickland, 466 U.S. at 688) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

Defendant also failed to sustain his burden of showing that but for his counsel's alleged error in failing to investigate the retention of a lock mechanism expert, there is a reasonable probability the result of his trial would have been different. See Strickland, 466 U.S. at 694. A defendant claiming trial counsel was ineffective "must 'affirmatively prove prejudice'" under Strickland's second prong. Gideon, 244 N.J. at 551 (quoting Strickland, 466

U.S. at 693). Defendant did not, and could not, satisfy that burden because he did not present any competent evidence establishing a putative expert's opinion concerning the locking mechanism and, as a result, the record is bereft of evidence establishing the failure to investigate the retention of an expert resulted in prejudice under Strickland's second prong.

In sum, defendant failed to present competent evidence demonstrating a prima facie claim trial counsel was ineffective by failing to investigate the retention of a locking mechanism expert. Defendant's failure to satisfy both prongs of the Strickland standard required the denial of his ineffective-assistance-of-counsel claim founded on that contention. See Harris, 181 N.J. at 484.

D.

Defendant also generally alleges the court erred by denying his request for an evidentiary hearing on his claims trial and appellate counsel were constitutionally ineffective. A defendant is entitled to an evidentiary hearing on an ineffective-assistance-of-counsel claim "only upon the establishment of a prima facie case in support of [PCR], a determination . . . there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination . . . an evidentiary hearing is necessary to resolve

the claims for relief." R. 3:22-10(b); see also Porter, 216 N.J. at 354. "To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the" Strickland standard. State v. Preciose, 129 N.J. 451, 463 (1992) (emphasis in original).

As we have explained, the PCR court correctly determined defendant failed to present sufficient competent evidence establishing a prima facie ineffective-assistance-of-counsel claim under the Strickland standard against his trial and appellate counsel on all the various theories he asserted. The PCR court therefore properly rejected defendant's argument he was entitled to an evidentiary hearing. See R. 3:22-10(b) (requiring an evidentiary hearing "only upon the establishment of a prima facie case in support of" PCR).

III.

Defendant argues he is entitled to PCR because the trial court committed errors that unconstitutionally deprived him of his right to a fair trial. More particularly, he claims the court violated his constitutional right to self-representation at trial. See Faretta v. California, 422 U.S. 806, 818-19 (1975) (explaining the Sixth Amendment to the United States Constitution, which applies to the states via the Fourteenth Amendment, provides criminal

defendants the right to proceed without counsel where they voluntarily and intelligently elect to do so); State v. Davenport, 177 N.J. 288, 301-02 (2003) ("The right to counsel guaranteed under Article 1, paragraph 10 of the New Jersey State Constitution includes the right of self-representation.").

Defendant's claim is founded on the colloquy between himself and the court during the initial status conference in the case. During the colloquy, defendant expressed dissatisfaction with the attorney from the Office of the Public Defender assigned to represent him. Defendant informed the court he had written to the attorney's "boss[es]" and was "waiting to hear from" them, and the court informed defendant it was up to them to determine if they would "change" defendant's assigned counsel.

In response, defendant stated, "Then I'll represent myself," and the court advised "it [would] be up to the court whether that occurs" and defendant "would have to make a motion to represent [himself]." The court further explained it would establish a motion schedule and defendant could "continue to process [his] request through" the Office of the Public Defender for assignment of a different counsel and "see what happens with regard to it." The court further advised defendant it "would proceed with anything"

defendant "want[ed] to do," including "any further correspondence or whatever, to get that straightened out."

We consider in context the statement — "Then I'll represent myself" — upon which defendant exclusively relies to support his claim the court denied him the right to self-representation at trial. Defendant made the statement during a colloquy addressing his assertions that he was awaiting the Office of the Public Defender's response to his request for a change in assigned counsel. As reflected in the colloquy, the court fairly understood the statement as raising a potential issue — defendant's possible determination he would represent himself — that would be addressed if defendant's request for the assignment of new counsel was not granted.

As the court explained, defendant should continue the process of seeking the assignment of new counsel from the Office of the Public Defender, and the court would proceed with whatever defendant "want[ed] to do," to get that "straightened out." Defendant did not disagree with the court's suggested plan and he did not inform the court he was unwilling to await the Office of the Public Defender's response to his request for the assignment of new counsel or that he sought to represent himself prior to a decision on his then-pending request. In other words, the record establishes defendant did not make a

request to appear as a self-represented litigant when he stated, "Then I'll represent myself," and, in our view, the court could not have denied a request that was not made in the first instance.

Moreover, although the court directly informed defendant he must make a motion to proceed pro se, defendant never did so. Indeed, during the many pre-trial and trial proceedings that followed his colloquy with the court, defendant never raised the issue of self-representation again, even after the Office of the Public Defender apparently denied whatever request he made for a new lawyer.[6] There is no evidence defendant filed a motion to proceed as a self-represented litigant, raised the issue again during any court proceedings, or ever again objected to representation by his assigned counsel. To the contrary, more than eighteen months after the status conference, at the commencement of the trial prior to the jury being sworn, and again during the trial, the court engaged in colloquies with defendant concerning his right to testify or not testify at trial. During those direct interactions with the court,

[6] It appears the Office of the Public Defender rejected whatever requests defendant made for the assignment of new counsel; the same counsel about whom defendant complained during the initial status conference remained his attorney throughout trial.

defendant did not request or suggest he sought to proceed as a self-represented litigant.

The assertion of the right of self-representation "must be made 'clearly and unequivocally.'" State v. Rose, 458 N.J. Super. 610, 626 (App. Div. 2019) (quoting Faretta, 422 U.S. at 835); see also State v. Figueroa, 186 N.J. 589, 593 n.1 (2006) ("The need for an unequivocal request for self-representation by a defendant is a necessary prerequisite to the determination that the defendant is making a knowing and intelligent waiver of the right to counsel."). "Whether 'orally or in writing,' a defendant [must] make the request 'unambiguously . . . so that no reasonable person can say that the request was not made.'" Rose, 458 N.J. Super. at 626-27 (quoting Dorman v. Wainwright, 798 F.2d 1358, 1366 (11th Cir. 1986)).

Here, we reject defendant's claim the court denied defendant his right to self-representation because, in our view, defendant never made a request to proceed pro se in the first instance. Additionally, although the court expressly informed defendant he should make a motion if he sought to proceed pro se, defendant never made the motion or communicated even an ambiguous request for self-representation prior to, or at, trial. Having not been presented with

evidence of even an ambiguous request to proceed pro se, the court neither denied nor deprived defendant of his right to self-representation.

To the extent we have not expressly addressed any of defendant's remaining arguments, we find they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION