

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2716-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MIGUEL PINTIN, a/k/a
MIGUEL PINTON,

Defendant-Appellant.

Submitted May 31, 2023 – Decided July 19, 2023

Before Judges Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Indictment No. 14-07-1079.

Faugno & Associates, LLC, attorneys for appellant
(Paul Faugno, on the brief).

Mark Musella, Bergen County Prosecutor, attorney for
respondent (William P. Miller, Assistant Prosecutor, of
counsel and on the brief; Catherine A. Foddai, Legal
Assistant, on the brief).

PER CURIAM

Defendant Miguel Pintin appeals from an April 7, 2022 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Because defendant failed to establish a prima facie showing of ineffective assistance of his trial counsel, we affirm.

I.

A jury convicted defendant of second-degree sexual assault by sexual contact, N.J.S.A. 2C:14-2(b); and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). The jury acquitted defendant of two other counts of second-degree sexual assault.

Defendant's convictions arose out of his sexual assault of an eight-year-old girl in 2013. At that time, the victim, L.M., lived in Fairview, New Jersey with her mother, Y.F.; her grandmother; and other relatives.¹ Defendant was married to the sister of L.M.'s grandmother and, therefore, was the victim's great-uncle by marriage.²

¹ We use initials for the victim and certain of her relatives to protect the privacy interests of a child sexual-assault victim. R. 1:38-3(c)(9).

² Defendant and his wife both testified that they had divorced around 1987 but continued to reside with each other thereafter. L.M. and Y.F. continued to refer to defendant as the husband of L.M.'s great-aunt. The parties similarly refer to defendant and L.M.'s great-aunt as husband and wife. We, therefore, do the same.

In April 2013, defendant and his wife lived in Canada, but they had come to New Jersey for a family visit. While in New Jersey, they stayed at the home in Fairview.

On April 25, 2013, L.M. went to school. While she was at school, her mother and defendant's wife went to Newark for an appointment. L.M.'s mother did not return home until approximately 7:00 p.m. that evening. Meanwhile, L.M. had been picked up from school by another relative and brought home. Thereafter, defendant helped L.M. do her homework in a bedroom at the home.

A couple of hours after Y.F. arrived home, L.M. told her that defendant "likes sex." L.M. then told her mother that while she had been doing her homework, defendant had repeatedly pulled up her skirt, tried to look at her "privates," and had "touched . . . and groped her." Thereafter, Y.F., with L.M. present, confronted defendant and his wife concerning L.M.'s disclosures. At approximately midnight, defendant, his wife, and another relative, left the Fairview home and drove back to Canada.

The following day, Y.F. brought L.M. to the Fairview Police Department and reported the assault. L.M. and Y.F. were taken to the Bergen County Prosecutor's Office, where a detective interviewed L.M. During that interview, which was video recorded, L.M. told the detective that defendant had "rubbed

his balls" on her, had put his hands on her "privacy" over her clothing, had lifted up her skirt, and tried to look down her shirt.

The trial was conducted in 2019, when L.M. was fifteen years old. The jury heard testimony from numerous witnesses, including L.M., Y.F., defendant, defendant's wife, and L.M.'s grandmother. L.M.'s video-recorded statement, given to the detective the day after the incident, also was played for the jury.

At trial, L.M. testified that on the day of the assault, defendant took her to school and tried to hold her hand, which made her uncomfortable. Later that day, defendant helped L.M. with her homework in a bedroom. According to L.M., while they were in the bedroom, defendant "tried to feel [her] over [her] shirt" and tried "to pull down [her] shirt or pull up [her] skirt."

Following her direct examination, defendant's trial counsel asked L.M. thirty-one questions on cross-examination. Most of the questions focused on where L.M. and defendant had been sitting while they were together in the bedroom; what L.M. had been wearing; and why L.M. had not told her grandmother about what had happened.

During Y.F.'s testimony, she described who lived in the Fairview home in 2013; defendant's and his wife's relationship to the family and their visit in 2013; and what L.M. had disclosed to her about the assault. On cross-examination of

Y.F., trial counsel brought out that Y.F. had taken L.M. to school on the day of the incident; what Y.F. did in Newark; that defendant had a "playful" relationship with children, including L.M.; that the night before the incident, Y.F. had asked defendant to help L.M. with her homework the next day; and that Y.F. felt comfortable asking defendant to help L.M. with her homework. Trial counsel also elicited that the grandmother had borrowed about \$8,000 from defendant's wife and Y.F. had used some of that money and owed money to defendant's wife.

In his testimony, defendant denied touching L.M. while they were together in the bedroom. He stated that the grandmother had checked on them "many times" and that he was only alone with L.M. for a few minutes at a time. Defendant also testified that later that evening, Y.F. had confronted him and demanded money. In addition, defendant contended that the allegations against him were "invented" and part of a scheme to extort money from him.

The grandmother testified that she was home at the time of the alleged incident and had checked on L.M. and defendant four or five times. She stated that she saw nothing that caused her concern. The grandmother also explained that she had borrowed money from defendant's wife but that she had given the money to her daughter.

Defendant's wife testified that she had not planned the trip to Newark and that it was Y.F. who proposed the trip. She also testified that when she returned to the home, defendant was calm and L.M. was "jumping around happily." In addition, defendant's wife stated that after Y.F. confronted her with the accusations, she wanted to call the police but did not make a call. She then stated that she, defendant, and another relative left for Canada at approximately 1:00 a.m. and thought nothing would come of the incident.

After hearing the testimony and considering the evidence presented at trial, the jury found defendant guilty of one count of second-degree sexual assault but acquitted him of two other counts of sexual assault. The jury also found defendant guilty of third-degree endangering the welfare of a child.

In January 2020, defendant was sentenced. On the conviction for the sexual assault, he was sentenced to seven years in prison with a period of parole ineligibility as prescribed by the No Early Release Act, N.J.S.A. 2C:43-7.2. On the conviction for endangering the welfare of a child, defendant was sentenced to four years in prison to be served concurrent to his sexual assault sentence. Defendant was also sentenced to parole supervision for life, N.J.S.A. 2C:43-6.4, and ordered to register as a sex offender under Megan's Law, N.J.S.A. 2C:7-1 to -23.

Defendant did not appeal from his convictions or sentence. Instead, in October 2021, defendant, represented by new counsel, filed a petition for PCR. He contended that trial counsel had been ineffective in cross-examining L.M. and Y.F. In that regard, he argued that trial counsel should have conducted more thorough cross-examinations to highlight inconsistencies among the statement given by L.M., her testimony at trial, and Y.F.'s testimony.

On April 1, 2022, the PCR judge, who had presided over defendant's trial, heard argument on defendant's petition. The judge reasoned that defendant's claim did not require an evidentiary hearing because he had failed to make a prima facie showing of ineffective assistance of counsel. The PCR judge explained that she had reviewed the trial testimony and found that trial counsel had adopted an appropriate strategy not to confront the alleged victim and her mother because such a tactic could have alienated the jury. The judge then found that trial counsel's performance had not been deficient, and defendant had not established a prima facie showing of ineffective assistance of counsel. On April 7, 2022, the judge issued an order denying defendant's PCR petition.

II.

On this appeal, defendant presents one argument for our consideration:

TRIAL COUNSEL'S LACK OF ANY MEANINGFUL
CROSS-EXAMINATION OF A CRUCIAL WITNESS
WAS CLEARLY INSUFFICIENT.

More specifically, defendant contends that the PCR judge erred in not conducting an evidentiary hearing to examine why trial counsel had not conducted more vigorous cross-examinations of L.M. and her mother.

Defendant's petition is brought in accordance with Rule 3:22-2, which permits collateral attack of criminal convictions based upon a claim of ineffective assistance of counsel. See R. 3:22-2(a); see also Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-part Strickland test: (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687; accord Fritz, 105 N.J. at 58 (adopting the Strickland two-prong test in New Jersey).

A petitioner is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013). Rule 3:22-10 provides that a defendant is entitled to an evidentiary hearing on a PCR petition only if he or she establishes a prima facie case in support of PCR, material issues of disputed fact cannot be

resolved by reference to the existing record, and an evidentiary hearing is necessary to resolve the claims for relief. See Porter, 216 N.J. at 354 (citing R. 3:22-10(b)). The PCR court should grant an evidentiary hearing only "if a defendant has presented a prima facie claim in support of [PCR]." State v. Preciose, 129 N.J. 451, 462 (1992).

When no evidentiary hearing is conducted, appellate courts review the denial of a PCR petition de novo. State v. Harris, 181 N.J. 391, 420-21 (2004); State v. Aburoumi, 464 N.J. Super. 326, 338-39 (App. Div. 2020). A PCR court's decision to proceed without an evidentiary hearing is reviewed for an abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013).

Defendant argues that his trial counsel was ineffective by failing to conduct more extensive cross-examinations of L.M. and Y.F. The PCR judge reasoned that defendant's trial counsel had adopted an appropriate and logical tactic in not vigorously cross-examining a fifteen-year-old girl who was testifying about an alleged sexual assault that occurred when she was eight years old. While we agree with the PCR judge that such a defense tactic seems logical and appropriate, we do not affirm on that basis. Without testimony by or a certification from trial counsel, there was no evidence of his trial strategy.

Nevertheless, the record does establish that trial counsel's cross-examinations were not constitutionally deficient.

A review of the trial transcripts establishes that defense counsel cross-examined both L.M. and Y.F. In his questioning, counsel brought out several of the inconsistencies that defendant now argues should have been more vigorously examined. While the trial transcripts do not expressly identify defendant's strategy, they do show that his attorney asked appropriate questions.

Defendant now argues that trial counsel should have been more vigorous and thorough in his cross-examinations. However, a review of the actual cross-examinations does not disclose errors so serious that counsel was not functioning as a constitutionally adequate defense counsel. In other words, defendant's bald assertion that his trial counsel should have asked more questions does not establish that trial counsel was deficient. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) (explaining that "to establish a prima facie claim, a defendant must do more than make bald assertions that he was denied the effective assistance of counsel").

In addition, defendant has made no showing of prejudice. Defendant must establish "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. Defendant, however, presented no evidence that more thorough examinations would have caused the jury to reach a different verdict. Instead, defendant essentially asks us to speculate that if his trial counsel had harped on the inconsistencies, which the jury could have recognized on its own, that harping would have produced a different verdict. The law is well settled that on a PCR petition defendant must support his contentions with facts and evidence and, if defendant does not, the petition should be denied. See Porter, 216 N.J. at 355; Cummings, 321 N.J. Super. at 170.

In short, defendant did not establish a prima facie showing of either prong of the Strickland test. We, therefore, reject his arguments on this appeal.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION