IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

MIGUEL BOZADA A/K/A MIGUEL BOSADA,

Appellant,

v. Case No. 5D18-2504

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed December 21, 2018

3.850 Appeal from the Circuit Court for Orange County, Jenifer M. Harris, Judge.

Miguel Bozada, aka Miguel Bosada, Malone, pro se.

No Appearance for Appellee.

EDWARDS, J.

Miguel Bozada appeals the summary denial of his amended Florida Rule of Criminal Procedure 3.850 motion in which he asserted that his trial counsel was ineffective for failing to investigate and present the testimony of a potentially exculpatory witness, Sarah A. We find that the postconviction court erred when it failed to conduct an evidentiary hearing as the documents attached to or identified in the order summarily

denying the motion do not conclusively refute his claim.[1]

Sarah A., a single mother of five girls, was involved in a relationship with Appellant. The couple began living together in 2009. Appellant fathered the youngest of the five girls and apparently assumed the role of father-figure to the rest of them. In November 2010, at least three of the girls told Ms. A. that Appellant had touched them inappropriately.

Appellant was charged with multiple counts of lewd or lascivious molestation and additional counts of capital sexual battery. The case went to trial, where three of the girls testified in detail as to what Appellant allegedly did to each of them. The State also called Ms. A., who testified that the girls told her about Appellant's sexual misconduct when she was having a talk with them about good versus bad touching. Ms. A. testified that Appellant saw that the girls did their homework, disciplined them as needed, and that the girls were unhappy when they were being disciplined. The girls' testimony confirmed that they did not like Appellant disciplining them when they misbehaved. On cross-examination, Appellant's counsel elicited from Ms. A. that she had visited Appellant in jail; however, that line of questioning was pursued no further. In November 2012, Appellant

[1] In its order summarily denying this claim, the postconviction court refers to specific pages in the trial transcript regarding Ms. A.'s testimony; however, the cited pages were not physically attached to the order. That omission did not cause this court any difficulty in its review as we have the full record on appeal available to us from Appellant's direct appeal. The rule requires the postconviction court to attach copies of relevant documents to any order of summary denial to avoid any miscommunication and to facilitate review. We are certain that the postconviction court will comply in the future.

was convicted of six counts of lewd or lascivious molestation and two counts of capital sexual battery, and was sentenced to life on all eight counts.[2]

Appellant claimed in his motion that Ms. A. visited him in jail a few months prior to trial, and told him that the girls had come to her and said they made up the allegations of misconduct because they were upset with Appellant for disciplining them. Appellant claims that this conversation at the Orange County jail was recorded. Further, Appellant alleges that he told his attorney all of this before trial, but his attorney failed to investigate it and failed to elicit such testimony from Ms. A. at trial.

Here, Appellant's allegations, taken as true, set forth a facially viable claim of ineffective assistance of counsel.[3] Because there was no physical evidence that Appellant sexually molested any of the girls, the State's case was based on the girls' testimony regarding what Appellant had done to them.[4] Taking the allegations of the rule 3.850 motion as true, Appellant's counsel should have followed up on the supposedly

[2] In this same rule 3.850 motion, Appellant successfully asserted that his original sentence, which included mandatory minimums, was illegal. The postconviction court's order setting aside the mandatory minimums was not appealed by either side.

[3] *See Strickland v. Washington*, 466 U.S. 668, 674 (1984).

[4] Ms. A. testified that before they moved to Florida, the girls had been sexually molested by a long-time friend and babysitter named Brian. Approximately two months before accusing Appellant of any misconduct, the girls, together, spoke with their mother in Florida and described the sexual acts that Brian had done to them while they lived in Minnesota; however, Ms. A. did not report that to Minnesota authorities. One of the girls testified that Appellant had started molesting them before they told Ms. A. about Brian, yet none of them told her about Appellant's misconduct during their discussion of Brian's sexual abuse.

recorded jail-house conversation between Ms. A. and Appellant.[5] If the investigation corroborated Appellant's claims, trial counsel should have attempted to impeach the girls with the statements of retaliatory fabrication they allegedly made to Ms. A. That is, at trial, Appellant's counsel should have asked the girls whether they told their mother that they had made up the allegations against Appellant.[6] Any party can attack the credibility of a witness by introducing statements of the witness that are inconsistent with the witness's present testimony. § 90.608(1), Fla. Stat. (2012). If the witness does not "distinctly admit" to making the prior inconsistent statement, extrinsic evidence of the statement is admissible. *Id.* "[I]ntroduction of a prior statement that is inconsistent with a witness's present testimony is also one of the main ways to attack the credibility of a witness." *Elmer v. State*, 114 So. 3d 198, 202 (Fla. 5th DCA 2012) (quoting *Pearce v. State*, 880 So. 2d 561, 569 (Fla. 2004)). If any of the girls admitted to making these statements of fabrication to their mother, their credibility would have been critically damaged; if they denied it, they would have been subject to impeachment. There is no requirement under Florida law that the witness's prior inconsistent statements be reduced to writing. *Id.* The prior inconsistent statement may be oral and unsworn. *Marshall v. State*, 68 So. 3d 374, 375 (Fla. 5th DCA 2011).

For extrinsic evidence of a witness's prior inconsistent statement to be offered, the witness must first be given the opportunity to explain or deny the prior statement. §

[5] Because there was no evidentiary hearing, we will not speculate on whether Appellant's counsel properly investigated and/or developed a strategy regarding Ms. A.'s alleged statements of fabrication. As of now, it is only Appellant's claim.

[6] According to his rule 3.850 motion, Appellant's counsel would have had a proper factual basis for making this inquiry.

90.614(2), Fla. Stat. (2012). If the girls denied making the statements, counsel should have asked Ms. A. on cross-examination whether the girls had told her that they made it all up. A witness can be called solely to establish that a second witness had previously made a statement inconsistent with the second witness's present testimony. *Elmer*, 114 So. 3d at 203. If Ms. A. testified that the girls told her they fabricated the allegations, the girls' testimony and credibility would have been seriously damaged. If Ms. A. denied telling Appellant that the girls told her they made up the allegations, counsel could have impeached her with the recorded jail-house conversation, if indeed it existed. "The theory of admissibility is not that the prior statement is true and the in-court testimony is false." *Id.* at 202 (quoting *Pearce*, 880 So. 2d at 569). "The [prior] inconsistent statement is not hearsay, because it is not offered to prove its truth, only to show the inconsistency for impeachment purposes." *Marshall*, 68 So. 3d at 375.

Based on the foregoing, unless there are other parts of the record not referenced in the order summarily denying his motion, which conclusively show that he is not entitled to relief, Appellant is entitled to an evidentiary hearing where he will have the burden of presenting evidence and proving that his counsel's performance was deficient and sufficiently prejudicial. *See O'Callaghan v. State*, 461 So. 2d 1354, 1355 (Fla. 1984); *see also* Fla. R. Crim. P. 3.850(f)(8)(B).

REVERSED AND REMANDED.

ORFINGER, J., concurs, and EISNAUGLE, J., concurs specially with opinion.

EISNAUGLE, J., concurring specially.

I agree with the majority that Appellant's motion is facially sufficient and that the record before us does not conclusively refute Appellant's claims. However, I do not join the remainder of the majority's discussion because I find it unnecessary for our disposition.