FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 5D22-1055
LT Case No. 2013-CF-54510-AX

DAMIEN DUFF-PORTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

3.850 Appeal from the Circuit Court for Brevard County.
Charles G. Crawford, Judge.

Daniel Ripley, of Ripley Whisenhunt, PLLC, Pinellas Park, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Bonnie Jean Parrish, Office of the Attorney General, Daytona Beach, for Appellee.

April 9, 2024

PER CURIAM.

Damien Duff-Porter appeals from final orders denying his rule 3.850 motion in which he sought postconviction relief based on allegations of ineffective assistance of trial counsel. As to Claims One and Three, we affirm without need for further discussion. We reverse as to Claim Two and remand for the trial court to either

attach records conclusively refuting his claim, or for an evidentiary hearing.

Appellant was accused, charged, and convicted of shooting the victim. The shots were fired into the victim's house from the back porch. The injured victim spoke to three police officers who responded to his house and identified the shooter, to all three officers, as Appellant. The victim told one officer that he walked past the sliding glass doors in his kitchen, heard shots, and when he turned towards the sliding doors, he saw Appellant on his back porch shooting at him. He was positive that the shooter was Appellant. When speaking with another officer, the victim said he had been sitting at his kitchen table, facing away from those sliding glass doors, when he heard a noise outside and observed Appellant outside, armed with a handgun. The second officer was told that as the victim turned and began to run away, Appellant began shooting and hit him several times in the back.

As a result of his injuries, the victim was paralyzed and for a period of time was in a coma and intubated. The victim came out of his coma and was able to testify at Appellant's bond hearing with regard to the events on the night he was shot; his testimony was videotaped. He testified that while facing the sliding doors, he observed Appellant on his well-lit back porch, less than ten feet away, that he saw Appellant fire his gun, hitting him in the stomach with his first shot. The victim claimed that Appellant shot him two more times in the stomach and nine times in the back. An unrelated shooting resulted in the victim dying before he could testify at Appellant's trial. The State introduced the videotape of the victim's bond hearing testimony at trial.

The jury convicted Appellant of attempted first-degree felony murder while inflicting great harm, aggravated battery while inflicting great harm, shooting into a building, and burglary of a dwelling.

In Claim Two of his rule 3.850 motion, Appellant asserts that his trial counsel was ineffective because of failure to call the initial responding officers as witnesses so that the jury would learn of the inconsistencies between the victim's initial version of events and the victim's testimony during the bond hearing. Appellant claims

that he was misidentified by the victim. He also claims that the victim had been told that Appellant was "out to get him," which predisposed the victim to be looking for Appellant. He further claims that his misidentification defense would have been successful had the jury learned that the victim initially told one officer that his back was turned when he first heard shots and that he told the other officer he was running away when he was shot. He argues that it would have been unlikely for the victim to have taken the time to look out the glass doors if shots had already been fired and he was running, as the victim told one officer. Likewise, Appellant argues that if the victim had already been shot in the back, he would be unlikely to have much time to see who was shooting him.

Appellant argues in Claim Two that the victim's videotaped testimony from the bond hearing, which was all the jury was provided, gave the impression that the victim had a clear view and was actually looking right at the Appellant when he was shot. He claims that the unrebutted, unimpeached testimony undermined his misidentification defense theory. Appellant asserts that there was no other witness and no physical evidence placing him at the scene of the crime.

"[A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the [defendant] is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." *Hird v. State*, 204 So. 3d 483, 484–85 (Fla. 5th DCA 2016) (quoting *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000)). "The failure to call a witness can constitute ineffective assistance of counsel if the witness might be able to cast doubt on the defendant's guilt." *Santos v. State*, 152 So. 3d 817, 819 (Fla. 5th DCA 2014) (citing *Gutierrez v. State*, 27 So. 3d 192, 194 (Fla. 5th DCA 2010)). Appellant's claim that he was prejudiced by his counsel not presenting the police officers' testimony about the victim's prior inconsistent statements to cast doubt on the victim's opportunity to observe the shooter can suffice to prove prejudice in a case, such as this, where the victim is the sole witness who identified Appellant as the perpetrator. *English v. State*, 830 So. 2d 240, 241 (Fla. 4th DCA 2002); *see also Lopez v. State*, 773 So. 2d 1267, 1268 (Fla. 5th DCA 2000) (holding that failure to properly

impeach identification witnesses can amount to ineffective assistance of counsel which prejudiced defendant).

Appellant's Claim Two was summarily denied by the lower court without any finding that it was insufficiently pled. The court did attach certain documents including certain portions of the trial transcript. However, the attachments do not conclusively refute Appellant's Claim Two. Accordingly, we reverse and remand for the court to either conduct an evidentiary hearing or to attach documents that conclusively refute Appellant's Claim Two.

REVERSED and REMANDED with instructions.

EDWARDS, C.J., and LAMBERT and EISNAUGLE, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.