

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MICHAEL DEFURIA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-492

October 15, 2021

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Pinellas County; Philip J. Federico, Judge.

Michael Ufferman of Michael Ufferman Law Firm, P.A., Tallahassee, for Appellant.

SLEET, Judge.

Michael Defuria challenges the postconviction court's order summarily denying his Florida Rule of Criminal Procedure 3.850 motion in which he alleged several claims of ineffective assistance of counsel in conjunction with his conviction after jury trial for

attempted second-degree murder. We find error only in the court's summary denial of ground three and reverse as to that claim only.

In ground three of his rule 3.850 motion, Defuria argued that defense counsel rendered ineffective assistance of counsel by erroneously advising him that he should not testify at trial. He maintained that his sole defense at trial was self-defense and that he would have testified that he had acted out of self-defense when he shot the victim. Specifically, Defuria alleged that had counsel not advised him otherwise, he would have testified at trial that he and the victim had been drinking all day and that, at one point, he discovered money missing and accused the victim of taking it. He would have further testified that the victim was very angry with Defuria for accusing him of the theft and that, when the victim drove Defuria home, after Defuria went inside and locked the door, the victim returned and started banging on the door. According to Defuria, he grabbed a gun and answered the door and the victim began attacking him with a hammer. Defuria maintains that the victim hit him in the head repeatedly with the hammer and that he feared for his life so he shot the victim multiple times. Defuria

alleged in his postconviction motion that if he had taken the stand and testified to these events, he would have been acquitted at trial.

In denying this claim, the postconviction court determined that Defuria had failed to establish both that trial counsel's performance was deficient and that he was prejudiced by the actions of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). The court concluded that

evidence, already in the record from Defendant's statements to law enforcement, was sufficient to support a claim of self-defense. Indeed, counsel used those statements to request instructions on self-defense and to argue to the jury that Defendant acted in self-defense. Therefore, counsel's advice not to testify was not deficient for the reasons Defendant alleges. Moreover, because the jury heard his statement that he acted in self-defense and found him guilty anyway, there is no reasonable probability that his testimony, in which he would similarly claim that he acted in self-defense, would lead to a different result.

However, "a defendant's testimony cannot be 'cumulative' because the impact of a defendant's own testimony is qualitatively different from the testimony of any other witness." *Riggins v. State*, 168 So. 3d 322, 325 (Fla. 2d DCA 2015).

While the trial court may have discretion to limit the number of other witnesses a defendant may call to present cumulative evidence, the defendant's own testimony simply is not "cumulative" to that of any other

witness because of its different effect on the jury.
Therefore, this rationale cannot be the basis for denying postconviction relief.

Id. (emphasis added); *cf. Cox v. State*, 189 So. 3d 221, 223 (Fla. 2d DCA 2016) ("Although the postconviction court determined that the alibi testimony would have been cumulative to Mr. Cox's statement as related through the detective's testimony, the alibi testimony would have differed in quality and thus would not have been cumulative."). As such, the fact that Defuria's claim of self-defense was introduced to the jury through his statement to police does not conclusively refute his claim that he was prejudiced by counsel's advice not to testify.

Furthermore, to the extent that the postconviction court's denial of this claim is based on a conclusion that counsel's advice not to testify was sound trial strategy, "[to] conclude that an action or inaction taken by a trial attorney was a strategic decision generally requires an evidentiary hearing." *Hamilton v. State*, 915 So. 2d 1228, 1231 (Fla. 2d DCA 2005) (alteration in original) (quoting *Sampson v. State*, 751 So. 2d 602, 602 (Fla. 2d DCA 1998)).

Accordingly, we reverse the summary denial of this claim and remand for the postconviction court to either attach record portions that conclusively refute the claim or hold an evidentiary hearing. We affirm in all other respects.

Affirmed in part, reversed in part, and remanded.

NORTHCUTT and KHOUZAM, JJ., Concur.

Opinion subject to revision prior to official publication.