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

MARKICE LUVERN HARVEY,

Appellant,

v. Case No. 5D20-166

STATE OF FLORIDA,

Appellee.

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Opinion filed January 22, 2021

Appeal from the Circuit Court
for Brevard County,
Robin C. Lemonidis, Judge.

Matthew J. Metz, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Allison Leigh Morris, Assistant Attorney General, Daytona Beach, for Appellee.

EDWARDS, J.

Appellant, Markice Luvern Harvey, appeals his conviction, judgment, and sentences for first-degree premediated murder and robbery with a firearm resulting in

death.[1] He is currently, and will continue to be, serving concurrent life sentences with mandatory minimum provisions, as we affirm as to all issues raised on appeal.

First, Appellant argues that the evidence was insufficient to support the jury's verdict of murder, while conceding the evidence proved manslaughter. He also argues that the evidence may have been proof of theft, but was insufficient to prove that Appellant robbed the victim. To preserve an argument of the insufficiency of the evidence at trial "the precise legal argument as to why the evidence is insufficient to sustain a conviction must be presented to the trial court." *Newsome v. State*, 199 So. 3d 510, 513 (Fla. 1st DCA 2016) (citing *Woods v. State,* 733 So. 2d 980, 984 (Fla. 1999)). As Appellant acknowledges, those issues were not preserved for appeal because Appellant's trial counsel made the decision to not argue any motions for judgment of acquittal during trial. We will not entertain these arguments which are being raised for the first time on appeal.

Appellant's second point on appeal regarding the denial of a continuance was preserved, but lacks merit. Denial of a motion for continuance is reviewed for abuse of discretion. *Boffo v. State*, 272 So. 3d 876, 878 (Fla. 5th DCA 2019). Defense counsel requested the continuance after both sides had rested and closing argument was about to commence. The asserted purpose of the requested continuance was for defense counsel to meet with a person whose identity had just been disclosed to counsel by a member of Appellant's family as a possible witness. Defense counsel had not met with or spoken to the potential witness. To prevail on a motion for continuance to permit presentation of an additional witness, a party is required to show 1) prior due diligence in

[1] Appellant was also convicted of first-degree felony murder, but at the State's recommendation, that conviction was dismissed on double jeopardy grounds, as Appellant had committed one murder.

securing the witness's presence, 2) substantially favorable testimony would have been forthcoming, 3) the witness is available and willing to testify, and 4) the denial of the continuance caused material prejudice. *Geralds v. State,* 674 So. 2d 96, 99 (Fla. 1996). Appellant failed to make the showing required by *Geralds*, thus we find no abuse of discretion and affirm as to the second point on appeal.

Third, Appellant asserts that defense counsel provided ineffective assistance and he requests us to review that issue on direct appeal.[2] As a general rule, claims for ineffective assistance of counsel are best dealt with as Florida Rule of Criminal Procedure 3.850 postconviction motions and proceedings. *See Robards v. State*, 112 So. 3d 1256, 1266 (Fla. 2013). We disagree with Appellant's claim that this case fits into the *Barnes v. State* category as "one of the rare examples in which the ineffectiveness of trial counsel is cognizable on direct appeal." 218 So. 3d 500, 505 (Fla. 5th DCA 2017).[3] Accordingly, we affirm as to that issue as well.

Conclusion

We affirm as to all issues raised on appeal. We note that Appellant may pursue a rule 3.850 motion, if he can do so in good faith.

AFFIRMED.

ORFINGER and COHEN, JJ., concur.

[2] Appellant's appellate counsel was not trial counsel.

[3] *See Bell v. Cone*, 535 U.S. 685, 691–93 (2002); *Mansfield v. State*, 911 So. 2d 1160, 1174 (Fla. 2005); *Waterhouse v. State*, 596 So. 2d 1008, 1011–14 (Fla. 1992); *Neal v. State*, 854 So. 2d 666, 670 (Fla. 2d DCA 2003).