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

WILLIAM TURNER,

Appellant,

v. Case No. 5D21-758

STATE OF FLORIDA,

Appellee.

_____/

Decision filed July 23, 2021

3.850 Appeal from the Circuit Court for Orange County,
Elaine A. Barbour, Judge.

William Turner, Crawfordville, pro se.

Ashley Moody, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

COHEN and EDWARDS, JJ., concur.
LAMBERT, C.J., concurs, and concurs specially, with opinion.

LAMBERT, C.J., concurring specially. 5D21-758

William Turner was convicted after trial of attempted second-degree murder with a weapon, aggravated battery with a deadly weapon or causing great bodily harm, and burglary of a dwelling with an assault or battery with a weapon. The victim in the case was Turner's former girlfriend. Turner struck the victim with a hammer on her head and body while he was inside her home, causing serious injuries that required multiple surgeries. Turner's convictions and sentences were affirmed on direct appeal without opinion. *See Turner v. State*, 187 So. 3d 1263 (Fla. 5th DCA 2016).

Presently before us is Turner's appeal of the postconviction court's summary denial of his amended motion for postconviction relief filed under Florida Rule of Criminal Procedure 3.850. Turner raised seven grounds for relief based on the alleged ineffective assistance of his trial counsel, with the seventh ground being a claim of cumulative error. I concur with the affirmance of the denial order but write to address the denial of ground five of Turner's motion.

Turner argued in ground five that, under *Strickland v. Washington*, 466 U.S. 668 (1984), he had been prejudiced by his counsel's ineffective performance when counsel failed to impeach the victim's trial testimony with alleged inconsistent pretrial statements that she had given to various law

enforcement officers regarding facts material to the case. *See Varas v. State*, 815 So. 2d 637, 640 (Fla. 3d DCA 2001) ("It is well-settled that a witness may be impeached by a prior inconsistent statement, including an omission in a previous out-of-court statement about which the witness testifies at trial, if it is of a material, significant fact rather than mere details and would naturally have been mentioned." (citing *State v. Smith*, 573 So. 2d 306, 313 (Fla. 1990))).

In his amended motion, Turner set forth several examples of the victim's trial testimony that he asserted should have been impeached with the victim's inconsistent pretrial statements, had his counsel performed effectively. In summarily denying this claim, the postconviction court adopted the State's response to Turner's motion that trial counsel was not ineffective because the victim's alleged prior inconsistent statements at issue were neither material nor significant.[1] The court also determined that Turner failed to show that had these inconsistent pretrial statements from the victim been introduced at trial, there was a reasonable probability that the result of the trial would have been different. *See Strickland*, 466 U.S. at 694 (explaining that to be entitled to postconviction relief based on counsel's

[1] The State's response, which also included documents of record, was attached to the denial order.

alleged deficient performance, the movant must allege and show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"; and clarifying that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome"). In my view, Turner has not shown here that the court erred in denying ground five of his amended motion.

First, Turner appears to concede in his initial brief, albeit somewhat generically, that the differences between some of the victim's pretrial statements described in his motion and her later trial testimony may, in fact, have been immaterial. However, other than two prior inconsistent statements that he does specifically address in his brief and that he contends should have been used by counsel for impeachment purposes, Turner does not further elucidate how the other examples of the victim's alleged inconsistent pretrial statements set forth in his motion but not used by his counsel to impeach the victim's trial testimony justify relief under *Strickland*. Turner's failure to fully brief and argue error on these matters constitutes a waiver. *See Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further

elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

As indicated, Turner provides two examples in his brief of the victim's alleged inconsistent pretrial statements that, he argues, show that his counsel was ineffective because counsel did not use these statements to impeach the victim's trial testimony. First, Turner points to the victim's alleged pretrial statement that she had not seen Turner with a weapon; yet, at trial, the victim testified that she saw Turner hit her with a weapon and, more specifically, a hammer. While this difference in the victim's trial testimony, at first blush, would appear to have been fertile grounds for impeachment, the allegations contained in Turner's amended motion belie his argument that the victim's pretrial statement was actually inconsistent with her trial testimony.

More particularly, Turner alleged in his motion that, in response to law enforcement's inquiry as to whether Turner retrieved the hammer that he used from inside the garage or whether he brought it to the house, the victim responded, "I don't know." Turner argues that this pretrial statement of the victim was inconsistent with her trial testimony that she saw Turner strike her with the hammer.

Turner is incorrect. To be used as impeachment, a pretrial statement must either directly contradict or be materially different from the testimony offered by the victim at trial. *See Woods v. State*, 92 So. 3d 890, 892 (Fla. 4th DCA 2012) (noting that when impeaching a witness, "[t]he prior statement must directly contradict, or be materially different from, the testimony offered at trial" (citing *Pearce v. State*, 880 So. 2d 561, 569 (Fla. 2004))). The victim not knowing how Turner acquired the hammer does not directly contradict, nor is materially different from, her trial testimony that Turner used the hammer.

The second pretrial statement of the victim that Turner argues here was inconsistent with her trial testimony pertains to where Turner was located when the victim gave him a glass of water. To put this in context, Turner was at the victim's home to retrieve some of his clothing. At trial, the victim testified that she allowed Turner inside her home and gave him a glass of water. In his amended motion, Turner alleged that the victim earlier had told a different story to one of the police officers, advising the officer that she gave Turner a glass of water while he was on the porch. The inference from this pretrial statement was that Turner had not been allowed inside the victim's home and thereafter entered the home without her consent.

Whether these statements were inconsistent was ultimately immaterial to Turner's conviction for burglary of a dwelling with an assault or battery with a weapon. Even if Turner had been initially invited into the victim's home, a burglary of a dwelling can be committed once the permission to remain in the dwelling has been withdrawn by the owner, as was charged here.[2] Permission to remain in a dwelling can be deemed to be revoked if the invitee commits a subsequent criminal act against the owner. *Cummings v. State*, 310 So. 3d 155, 159 (Fla. 2d DCA 2021); s*ee also Sparre v. State*, 164 So. 3d 1183, 1200–01 (Fla. 2015) (holding that the defendant's invitation to enter the victim's home was effectively rescinded when he began his fatal attack on the victim and she futilely attempted to defend herself). Once Turner committed the battery, he could not lawfully remain inside the victim's home and continue to strike her with the hammer because the "invitation" to remain inside the victim's home became implicitly withdrawn as a matter of law. *See Cummings*, 310 So. 3d at 159; *Sparre*, 164 So. 3d at 1201.

[2] In defining the different types of burglaries under Florida law, Florida's burglary statute includes the following pertinent definition: "[n]otwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance . . . [a]fter permission to remain therein has been withdrawn, with the intent to commit an offense therein." *See* § 810.02(1)(b)2.b., Fla. Stat. (2019).

In my view, the victim's trial testimony that she initially allowed Turner into her home was marginally more favorable to Turner's defense[3] to the burglary charge than her pretrial statement. As such, trial counsel had less reason to impeach the victim with her alleged inconsistent pretrial statement. Lastly, even if Turner's counsel should have impeached the victim with this one inconsistent pretrial statement, I agree with the postconviction court that, had this statement been introduced at trial, there is no reasonable probability that the result of the trial would have been different.

[3] Turner did not testify at trial and called no witnesses.