IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

COSTA T. VATHIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

CASE NO. 1D02-3906

Opinion filed July 24, 2003.

An appeal from the Circuit Court for Leon County.
Charles A. Francis, Judge.

Robert Augustus Harper and Michael Robert Ufferman of Robert Augustus Harper Law Firm, P.A., Tallahassee, for Appellant.

Charlie Crist, Attorney General, and Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Appellee.

PADOVANO, J.

The defendant, Costa T. Vathis, appeals a final order summarily denying his postconviction motion under rule 3.850 of the Florida Rules of Criminal Procedure. Seven arguments are presented in the appeal but only one merits discussion. The

defendant contends that his lawyer should have objected to an emotional outburst in the courtroom. We conclude that this claim is facially insufficient and we therefore affirm the summary denial of the motion.

A jury convicted the defendant of sexual battery on a child under the age of twelve. The child testified for the state during the trial, and when she was finished, her parents allegedly rushed forward in the presence of the jury to escort her back to her seat. The defendant maintains that the parents' conduct was a form of nonverbal bolstering of the child's testimony and that he did not receive effective assistance of counsel because his lawyer failed to object or move for a mistrial.

This allegation fails to meet either part of the standard set by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the defendant must allege facts that would support a conclusion that his lawyer's performance was deficient. As the Court explained in Strickland, "This requires [a] showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. We cannot say that the trial lawyer in this case made an error at all, much less an error so serious as to be the equivalent of a deprivation of the constitutional right to counsel.

All we know from the defendant's allegation is that his lawyer did not object to the emotional outburst. The argument advanced by the defendant proceeds from this simple fact to an assumption that an evidentiary hearing is required. However, the defendant has not alleged that an objection was necessary, or even that it would have been wise. Some lawyers might conclude that the jurors would see the parents' emotional display for what it is, and that an objection would be out of place.

The defendant contends that the actions or inactions of an attorney cannot be justified as a trial strategy unless the court has made a finding to that effect after an evidentiary hearing, but this argument assumes that the postconviction motion has first identified some act or omission that is below the applicable standard of performance. If the motion fails to establish that a particular act or omission fell below the standard, there is no need for counsel to explain, or for the court to consider whether the act or omission was strategic. The question here is not whether the defendant's trial counsel could have objected; rather, it is whether a reasonably effective lawyer would have objected.

In addressing this question we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Furthermore, we have been warned that we should "eliminate the distorting effects of hindsight" in evaluating an attorney's performance.

Id. There are many different ways to provide effective assistance of counsel. That is why the Supreme Court said, "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 2d 83 (1955)). In this case, the defendant has succeeded only in showing that there was no objection. That is not enough to support a conclusion that his lawyer's performance was constitutionally defective.

The second part of the test in Strickland requires a showing that the action or inaction of counsel was prejudicial. This means that counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687. In our view, the allegations of the postconviction motion fall short of meeting this standard. The defendant claims that the parents' outburst was a form of nonverbal "bolstering" of the child's testimony, but that is not necessarily so. A more logical deduction from these facts is that the parents were trying, in their way, to comfort a child who had been through the ordeal of testifying. In any event, we would be giving very little credit to the jurors to say that the incident made them more likely to believe the child's account of the crime. Few criminal trials are completely devoid of emotion. We cannot presume that the emotion shown in this one must have been prejudicial.

Even if we were to speculate that the incident caused some jurors to become unduly sympathetic, that would not establish prejudice. As the documents attached to the trial judge's order reveal, the jurors were instructed that "[the] case must not be decided for or against anyone because [they] feel sorry for anyone or are angry at anyone." This instruction was given for a purpose, and we must assume that the jurors followed it in deciding their verdict.

For these reasons we conclude that the defendant's postconviction motion was properly denied without a hearing.

Affirmed.

KAHN J., Concurs. ERVIN, J., Concurs and dissents with opinion.

ERVIN, J., concurring and dissenting.

I concur with the majority's decision to affirm the denial of appellant's postconviction motion as to all claims except the one addressed in the opinion, *i.e.*, whether the trial court erred in summarily denying the claim for ineffective assistance of counsel regarding defense counsel's failure to object and move for mistrial at the time the victim's parents spontaneously rushed to the witness stand and escorted the victim back to her seat without the court's permission and in full view of the jury. As to that issue, I would reverse and remand for further proceedings, because the trial court's order and its attachments fail to show conclusively that appellant is not entitled to relief on this claim. Although the court attached documents suggesting that the issue was addressed in a post-verdict motion, it is impossible to discern whether the vague allegation in the motion, "Witness misconduct by the victim's mother," is the same as appellant's allegation, which was made under oath, that the parents rushed to the stand and accompanied their daughter to her seat.

With due respect to the majority, I cannot agree that appellant's motion is legally insufficient under the rule established in Strickland v. Washington, 466 U.S. 668 (1984). Appellant alleged the following in his motion:

> Trial counsel rendered ineffective assistance by failing to object and move for an immediate mistrial at the conclusion of the testimony of the alleged victim . . . . At

> the conclusion of the testimony of [the victim], her parents spontaneously rushed to the witness stand without permission from or request by the Court, and escorted her back to the gallery in full view of the jury. Such an emotional display should not have been permitted by the Court . . . . The spontaneous display of emotion by the parents served solely to garner sympathy for the alleged victim, thereby tainting the subsequent jury verdict due to the consideration of sympathy and the silent bolstering of the testimony of the alleged victim by the Court absent a timely objection and motion for mistrial. But for the omission by counsel, the trial court would have admonished the parents for violating court procedure, immediately instructed the jury to focus only upon the evidence, and/or granted the motion for mistrial.

In assessing these allegations, this court must not only consider the dictates of Strickland, but it must also consider the requirements set forth in Florida Rule of Criminal Procedure 3.850. Here, the trial court issued an order to show cause requesting the state to file a response to appellant's motion. This action implies that the trial court found the motion facially sufficient to require a response under rule 3.850, which states: "Unless the motion, files, and records of the case conclusively show that the movant is entitled to no relief, the court shall order the state attorney to file an answer[.]"

Although this court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance, appellant has sufficiently alleged deficient performance by asserting that counsel failed to object to a highly

emotional display in the jury's presence. The parents' conduct, if true, could have unduly bolstered the victim's credibility. Compare People v. Adams, 23 Cal. Rptr. 2d 512 (Cal. Ct. App. 1993) (concluding that the presence of a support person at the witness stand while the victim testified affects the presentation of demeanor evidence by changing the dynamics of the testimonial experience); State v. Suka, 777 P.2d 240 (Haw. 1989) (holding it was error to permit a counselor to accompany a 15-year-old witness at the witness stand). Moreover, possible prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the court. See, e.g., Beasley v. State, 744 So. 2d 649, 669 (Fla. 2000); Burns v. State, 609 So. 2d 600, 604-05 (Fla. 1992).

The trial court denied this claim, in part, for the reason that the lack of objection was a matter of trial tactics, and the majority appears to uphold that ruling when it states that "[s]ome lawyers might conclude that the jurors would see the parents' emotional display for what it is, and that an objection would be out of place." Whether an objection was wise under the circumstances is a matter of trial tactics, and this court has said that postconviction motions should not generally be denied based on tactical decisions by counsel in the absence of an evidentiary hearing. See Walker v. State, 678 So. 2d 924, 925 (Fla. 1st DCA 1996) ("when a court is confronted with

a claim of ineffective assistance, a finding that some action or inaction by defense counsel was tactical is generally inappropriate without an evidentiary hearing").

As for the prejudice prong, the majority ignores appellant's allegations, made under oath, that the emotional display tainted the jury's verdict due to consideration of sympathy. Although the majority might disagree, as previously stated, nothing attached to the order conclusively shows otherwise. The majority's reliance on the standard instruction to the jury, admonishing the jurors not to decide the case based on sympathy or anger, is misplaced, because that instruction, given at the conclusion of trial, was too remote to counter the prejudicial effects of the improper emotional display occurring during the state's case-in-chief.

In that I conclude that appellant's motion stated a facially sufficient claim for ineffective assistance of counsel on this point, I would reverse and remand for further proceedings.