FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-2024

CALVIN THOMAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Bruce Anderson, Judge.

November 20, 2019

OSTERHAUS, J.

Appellant Calvin Thomas was tried and convicted by a jury of armed robbery, aggravated fleeing or attempting to elude a law enforcement officer, and possession of cocaine. He was sentenced to concurrent terms of life in prison for armed robbery, twenty years in prison for fleeing and eluding, and five years in prison for possession of cocaine. After Appellant unsuccessfully appealed his judgment and sentence, he moved for postconviction relief, making eleven ineffective assistance of counsel claims. The trial court held an evidentiary hearing on one of the claims but summarily denied the remaining claims. The only issue on appeal involves the summary denial of claim eight in which Appellant argues that counsel was ineffective for failing to call two alibi witnesses. We affirm.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court outlined the two-pronged test to determine ineffective assistance of trial counsel. *Spera v. State*, 971 So. 2d 754, 757 (Fla. 2007). To be entitled to relief, a defendant must establish both prongs. *See id.* at 758. "The deficient performance prong requires . . . acts or omissions of counsel that are 'so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.' The prejudice prong requires . . . 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 757-58 (quoting *Strickland*, 466 U.S. at 649). "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record." *Foster v. State*, 810 So. 2d 910, 914 (Fla. 2002) (quoting *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999)).

Appellant argues that defense counsel was ineffective for not calling two alibi witnesses at trial. To state a facially sufficient claim of ineffective assistance of counsel based on the failure to call a witness, "the movant must allege the identity of the potential witness, the substance of the witness's testimony, an explanation of how the omission of the testimony prejudiced the outcome of the case, and a representation that the witness was available for trial." *Leftwich v. State*, 954 So. 2d 714, 714 (Fla. 1st DCA 2007). Appellant's motion alleged that the two witnesses—Mr. Wingard and Ms. Braswell—were available and would have testified that he was in New Jersey on the date of the armed robbery.

The trial court gave two reasons for its summary denial: (1) that the alibi testimony would have been cumulative of testimony elicited from another witness, and (2) that the record conclusively refuted Appellant's contention that he wished to call these particular alibi witnesses at trial. Though the parties and the trial court treated this claim as having been summarily denied, aspects of this claim were addressed in the hearing below. The hearing transcript addresses, for instance, that witness Wingard had a lengthy criminal record. Appellant's postconviction counsel reasoned that the choice not to have Wingard testify was made because of his credibility. The record also demonstrates that Wingard's alibi testimony would have been cumulative. *See Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007) (recognizing that

"trial counsel is not ineffective for failing to present cumulative evidence"). Additional testimony is not cumulative if it differs in quality and substance and may enhance a defendant's case with the jury. *See Valle v. State,* 502 So. 2d 1225, 1226 (Fla. 1987) (finding evidence not to be cumulative when it "differed in quality and substance" from other witnesses); *Riggins v. State,* 168 So. 3d 322, 325 (Fla. 2d DCA 2015) (evaluating the effect of potential testimony on the jury). Here, not only did Wingard's deposition indicate that his testimony would have been the same as the alibi testimony provided by another trial witness, but Wingard was a convicted felon, just like that trial witness. Contrary to Appellant's contention, witness Wingard's character was not "beyond reproach." And Wingard would have been subject to the same damaging cross-examination as that experienced by the trial witness. Under these circumstances, we find no error in the trial court's decision to deny Appellant's ineffective assistance claim on the basis that witness Wingard's testimony would have been cumulative.

As for witness Braswell, it is not clear from the record whether her alibi testimony would have been cumulative. However, the record refutes Appellant's contention that he desired to call Braswell as a witness at trial. The order below quoted portions of a colloquy at trial between the court, defense counsel, and the Appellant, in which, after the defense had rested its case, Appellant indicated that he wanted to call more witnesses. After the trial court indicated that it would allow him to do so, the additional witnesses he identified to his counsel and the court did not include Braswell. In addition, after the trial court addressed Appellant's uncalled-witness issue, the court asked for and received Appellant's assurance that he was satisfied with his counsel's performance. Based on this record, we find no error in the trial court's conclusion that Appellant failed to communicate that he wished to call Braswell as an additional alibi witness. *See Terrell v. State*, 9 So. 3d 1284, 1289 (Fla. 4th DCA 2009) (rejecting a defendant's claim based on his attorney's failure to call a witness because the colloquy transcript showed that the defendant did not want to call any other witnesses); *see also Burkhalter v. State*, 44 Fla. L. Weekly D2258, 2019 WL 4249637 (Fla. 1st DCA Sept. 9, 2019) (concluding that a defendant's consent on the record to a decision not to call witnesses thwarted his ineffective assistance of

counsel claim). We thus affirm the order denying postconviction relief.

AFFIRMED.

B.L. THOMAS and ROWE, JJ., concur.

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

Calvin Thomas, pro se, Appellant.

Ashley Moody, Attorney General, and Holly N. Simcox, Assistant Attorney General, Tallahassee, for Appellee.