FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-2173

ZETHANIAH A. FAULK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Escambia County.
W. Joel Boles, Judge.

November 20, 2019

B.L. THOMAS, J.

The Appellant, Zethaniah Faulk, appeals from an order denying his postconviction motion brought pursuant to Florida Rule of Criminal Procedure 3.850. For the reasons discussed below, we affirm.

These offenses arose when the same suspects robbed two different Circle K convenience stores on the same night. Subsequently, the Appellant was charged in Escambia County case 2013-CF-2718 with robbery with a firearm while wearing a mask (count I), aggravated battery with a deadly weapon (count II), aggravated assault by threat with a firearm (count III), and possession of a firearm by a convicted felon (count IV). In Escambia County case 2013-CF-2719, he was charged with robbery of a

firearm while wearing a mask (count I), aggravated battery with a firearm (count II), aggravated assault by threat with a firearm (count III), and possession of a firearm by a convicted felon (count IV). These cases were consolidated for trial.

A jury trial was conducted. The evidence established that the first robbery occurred at the Circle K located on W Street, where two victims were working. At about 2:22 a.m., one victim was cleaning the men's bathroom while the other victim was cleaning out front when the Appellant and his codefendant entered the store. They were both armed with firearms and with shirts concealing their faces. The Appellant pointed a gun at one victim and demanded money from the registers, threatening to kill her if she did not comply. She had difficulty opening the first register, so the Appellant jumped over the counter and held his gun to her head. Hearing her scream, the other victim exited the men's bathroom. The codefendant threatened him with a shotgun, telling him to go back into the bathroom or he would be shot. He locked himself in the bathroom. Meanwhile, the first victim continued to struggle with the registers, so the Appellant struck her repeatedly in the head with his gun. Once the two men had obtained cash and lottery tickets, they forced the victim to lay on the ground and departed. She pressed a panic button to summon the police. When the robbery was over, she was bleeding. Surveillance footage from the store was introduced into evidence. The victim identified the Appellant in a photo lineup and in court as the man who robbed the store.

At about 3:40 a.m. that same night, the Appellant and his codefendant entered the Circle K located on Gulf Beach Highway, where the two victims were working. The Appellant entered the store and grabbed the victim by the ponytail. When she screamed, another victim came out of the cooler. The Appellant pointed a gun at the second victim and made him lay on the floor. Threatening the first victim with the gun, the Appellant dragged her by the hair to the registers and forced her to open them. After she complied, he made her get down on her knees to open the safe. She gave him $600. He asked for more and she told him she could not take any more money out of the safe until the light turned green again. He responded by striking her repeatedly in the head with the butt of the gun. The two men left, and the clerks called 911. Afterwards,

she was bleeding profusely from the head. This victim identified the Appellant in a photo lineup and in court. Surveillance footage was introduced into evidence.

The Appellant's videotaped-police interview was played for the jury. During that interview, he admitted to participating in both robberies and receiving a portion of the proceeds. He told the police that he did most of the work during the robberies because he is "the most dangerous one of them all." He indicated that two guns were involved in the offenses. He also said that he struck the clerk at the W Street Circle K because she was not doing what he wanted her to do. He also described "snatching up" the clerk in the Gulf Beach Highway Circle K.

At the conclusion of the trial, the Appellant was convicted as charged of counts I through III in each case. Count IV in each case had been severed, and these counts were subsequently dropped. On July 14, 2014, the Appellant was sentenced in case 2013-CF-2718 to life in prison with a 10-year mandatory minimum sentence on count I, 15 years in prison with a 10-year mandatory minimum sentence on count II, and 5 years in prison with a 3-year mandatory minimum sentence on count III. He was designated as a prison releasee reoffender (PRR) and a habitual felony offender (HFO) on all three counts. All sentences were imposed consecutively. In case 2013-CF-2719, he was sentenced to life in prison with a 10-year mandatory minimum on count I, 15 years in prison with a 10-year mandatory minimum on count II, and 5 years in prison with a 3-year mandatory minimum on count III. These sentences were also imposed consecutively, and he was designated as a PRR and an HFO on each count. His convictions and sentences were affirmed on appeal. *See Faulk v. State*, 173 So. 3d 969 (Fla. 1st DCA 2015).

Beginning in 2016, the Appellant filed a series of rule 3.850 motions raising various claims. Twice, the trial court struck the Appellant's motions with leave to amend. The operative motion—the Appellant's second amended rule 3.850 motion—raised six

claims of ineffective assistance of counsel, which the trial court summarily denied.*

In the Appellant's first claim, he argued that his attorney was ineffective for failing to seek sequestration of the witnesses pursuant to section 90.616, Florida Statutes (2013). He alleged that after one victim testified, she was overheard discussing her testimony with the victim of the other robbery. He asserted that trial counsel failed to object, inquire into the matter, and move for a mistrial. He claimed that counsel's omission allowed the witnesses to tailor their testimony to avoid impeachment.

To prove ineffective assistance a defendant must allege (1) the specific acts or omissions of counsel which fell below a standard of reasonableness under prevailing professional norms and (2) that the defendant's case was prejudiced by these acts or omissions such that the outcome of the case would have been different. *Strickland v. Washington*, 466 U.S. 668, 690-92 (1984). The prejudice prong requires that the defendant demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. If the defendant fails to satisfy one prong of the *Strickland* analysis, it is not necessary to consider the other prong. *Waterhouse v. State*, 792 So. 2d 1176, 1182 (Fla. 2001).

Here, the record reflects that during a recess taken after the first witness testified, defense counsel advised the trial judge that a defense witness had overheard two State witnesses discussing their testimony outside of the courtroom. In response, the prosecutor noted that the rule requiring sequestration of witnesses had not formally been invoked. The trial judge determined that in the absence of the formal invocation of the rule, there was technically no violation. The rule was then formally invoked, and the witnesses were brought into the courtroom and instructed not to discuss their testimony with anyone except for the attorneys.

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* Any claims that were raised in the previous rule 3.850 motions and not realleged in the second amended rule 3.850 motion have been abandoned. *See Rolling v. State*, 825 So. 2d 293, 295 n.1 (Fla. 2002).

The Appellant does not explain how these witnesses could have tailored their testimony or avoided impeachment by speaking to each other. They were each the victim of a different robbery at a different store. One victim spent most of the W Street robbery in the men's bathroom. He heard yelling and screaming and what sounded like pistol whipping through the bathroom door, but otherwise he had no personal knowledge of what transpired outside of the bathroom. He did not identify either suspect. By contrast, during the Gulf Beach Highway robbery, the Appellant dragged the other victim by her hair, forced her to open the registers and the safe while pointing a gun in her face, and beat her in the head with a firearm. This put her in a position to testify in detail about the events of the Gulf Beach Highway robbery and identify the Appellant in court.

Under these circumstances, this claim is facially insufficient for failure to show prejudice. As the Appellant was given two opportunities to amend this claim, it was properly denied with prejudice. *See Nelson v. State*, 977 So. 2d 710, 711 (Fla. 1st DCA 2008). It is also legally meritless, as counsel had no basis for an objection before the rule was formally invoked. *See* § 90.616, Fla. Stat. (2013) (providing that the rule may be invoked "[a]t the request of a party" or on the trial court's own motion). Lastly, there is no reasonable probability that a motion for a mistrial would have been granted under these circumstances. *See Heady v. State*, 215 So. 3d 164, 165 (Fla. 1st DCA 2017) (holding that a mistrial was unwarranted by the child victim's interaction with her mother and grandmother outside of the courtroom in violation of the rule of sequestration where the defense could not establish that the interactions affected the child's testimony).

In the Appellant's second claim, he argued that counsel was ineffective for failing to seek suppression of an out-of-court photo lineup. He alleged that the initial description given of the suspects was of "light-skinned males," which did not necessarily suggest that the suspects were African American. He asserted that the victims subsequently described the suspects as African American, which is inconsistent. He suggested that the witnesses may have assumed that all people of color look alike and randomly picked the Appellant out of a lineup. He also claimed that the State failed to call a crucial witness, the first witness to identify the Appellant.

He argued that he was prejudiced by the failure to seek suppression of the lineup on this basis and by counsel's failure to impeach the witnesses with their contradictory descriptions.

Insofar as the Appellant's claim is based on speculation that the victims may have chosen him out of the lineup because they believe that all people of color look alike, speculation does not provide a basis for postconviction relief. *See Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). Thus, this aspect of his claim was properly denied.

With regard to his assertions that the victims should have been impeached with their prior inconsistent statements to the police, this aspect of his claim is legally meritless. "The prior statement is admissible to impeach only if it is in fact inconsistent; i.e., it directly contradicts the in-court testimony or there is a material variance between the two statements." *Gudinas v. State*, 693 So. 2d 953, 964 (Fla. 1997) (quoting Charles W. Ehrhardt, *Florida Evidence*, § 614.1, at 482 (1995 ed.)). In the instant case, the police report reflects that after the first robbery, the initial description given was of two light-skinned black males. The report also contained descriptions of the perpetrators as black males. One victim testified at trial that the suspects were black males. The other victim made no reference to the race of the suspects during her trial testimony. Under these circumstances, counsel did not perform deficiently, as the record does not reflect a basis for impeachment.

As to the Appellant's claim that the first witness to identify the Appellant was a crucial witness who should have been required to testify, this claim is also meritless. "The State may call such witnesses as it sees fit." *Seaman v. State*, 608 So. 2d 71, 73 (Fla. 3d DCA 1992). Here, the Appellant does not identify any authority that required the State to call the witness to testify at trial. Nor is it clear how the failure to call the witness to testify regarding *his* identification of the Appellant would be relevant to the suppression of another witness' out-of-court identification. Under these circumstances, this claim was properly denied.

In the Appellant's third claim, he argued that counsel was ineffective for failing to impeach the two female victims of the

separate robberies. He alleged that one victim testified during her deposition that the robbery suspect did not have tattoos on his neck or back, and yet she testified at trial to seeing tattoos on his neck despite the covering over the suspect's head and neck. He further asserted that her testimony should have been impeached because while she indicated that the Appellant was shirtless during the robbery, she failed to notice the large tattoo on his back.

Insofar as the Appellant argued that the victim should have been impeached based upon her improper conversation with the other female victim, those two victims did not speak to each other. And, both witnesses were effectively cross-examined. Counsel undermined the victim's in-court identification by eliciting testimony that she was shown a photo lineup that included the Appellant and was not able to identify him. Counsel undermined the other victim's photo identification by eliciting testimony that she also identified someone in a lineup as the second suspect despite the fact that she was not certain the man she identified was the right person.

Regardless, as to either witness, the Appellant failed to explain how this omission affected the outcome of his trial. As this claim remained facially insufficient after two opportunities to amend, it was properly denied with prejudice. *See Nelson*, 977 So. 2d at 711. Additionally, given the evidence discussed above, including the surveillance footage and the Appellant's videotaped confession, there is no reasonable probability that impeaching these witnesses would have changed the outcome of the trial. Therefore, this claim was properly denied.

In the Appellant's fourth claim, he argued that counsel was ineffective for failing to seek a competency evaluation. In his fifth claim, he alleged that counsel was ineffective for failing to investigate and present defenses and mitigating evidence arising from his mental illnesses. In connection with these claims, he asserted that once, counsel briefly met with the Appellant when he was psychotic and paranoid. The Appellant claimed that at that time, he was unable to work with counsel, he had no understanding of the proceedings, and he was so depressed that he did not care about his life or future. He alleged that he had a "very long history of mental illness, [posttraumatic stress disorder

(PTSD)], bipolar disorder, and psychosis." He asserted that his PTSD stemmed from witnessing a friend being decapitated in 1999. He claimed that he also suffered a traumatic brain injury in a car accident, and that his condition was worsened by a violent encounter with police in 2008. He alleged that his symptoms were "very apparent" and included blackouts, memory loss, delusions, paranoid ideation, hearing voices, a short attention span, impulsivity, and hallucinations. He asserted that his family could have testified about his "extreme emotional distress" and there were medical records reflecting his mental health history.

"To satisfy the deficiency prong based on counsel's handling of a competency issue, the postconviction movant must allege specific facts showing that a reasonably competent attorney would have questioned competence to proceed." *Thompson v. State*, 88 So. 3d 312, 319 (Fla. 4th DCA 2012). "The question is 'whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings.'" *Id.* (quoting Fla. R. Crim. P. 3.211(a)(1)). "In order to establish prejudice in a properly raised ineffective assistance of counsel claim, the postconviction movant must . . . set forth clear and convincing circumstances that create a real, substantial and legitimate doubt as to the movant's competency." *Id.*

Here, the record reflects that the Appellant was questioned and consulted periodically during the proceedings. Before trial, the trial judge conducted a lengthy inquiry with the Appellant regarding counsel's motion to consolidate. During that inquiry, the Appellant indicated that he had not had any medication in the last 24 hours and had never been committed to a mental health facility. The trial judge found that the Appellant had freely, voluntarily, knowingly, and intelligently agreed with counsel's motion.

Subsequently, defense counsel consulted the Appellant before agreeing to stipulate to the Appellant's prior conviction. Counsel also conferred with the Appellant during jury selection. At the end of jury selection, the trial judge asked the Appellant whether he approved of the jury that had been selected, and the Appellant responded in the affirmative.

At trial, the Appellant participated in a colloquy regarding his decision not to testify. At the conclusion of that colloquy, the trial judge found that he had freely, voluntarily, knowingly, and intelligently elected to waive his right to testify. During sentencing, the Appellant was asked if he would like to speak, and he replied in the negative. Thus, before, during, and after trial, the Appellant was able to express himself appropriately, confer with counsel, and understand the judge's explanation of the proceedings.

There are other documents in the record that undermine the Appellant's claims of severe mental illness prior to and during the proceedings. The Appellant's presentence investigation report (PSI) reflects that on June 24, 2014, he advised that he was "in good condition with no prior mental or physical health diagnosis." His family was interviewed for the PSI, and his mother only indicated that he suffered from "routine headaches." The Appellant's wife advised that she believed that he suffered from undiagnosed depression. No one who was interviewed, including the Appellant, indicated that he was psychotic or paranoid. During the Appellant's sentencing hearing, the Appellant's sister testified that he never went a month without working. Under these circumstances, the record refutes the Appellant's claim that he was incompetent during the proceedings.

As to the Appellant's argument that his family could have testified about his mental health during his sentencing hearing, the Appellant was designated as a PRR in this case. Therefore, the trial judge did not have discretion to impose a sentence of less than life in prison. *See* §§ 775.082(9)(a)3.a.; 812.13(2)(a), Fla. Stat. (2013). Under these circumstances, the Appellant cannot show that he was prejudiced by counsel's failure to present mitigating evidence. *See Reese v. State*, 274 So. 3d 527, 529 (Fla. 1st DCA 2019) (holding that the appellant could not show prejudice based on counsel's failure to present mitigating evidence where the trial court was required to impose a mandatory life sentence under the PRR statute).

With regard to the Appellant's argument that counsel should have presented an insanity defense, this claim is also meritless.

An insanity defense applies where the defendant "commits an unlawful act, but by reason of a mental infirmity, disease, or defect is unable to understand the nature and quality of his or her act, or its consequences, or is incapable of distinguishing right from wrong at the time of the incident." *Patton v. State*, 878 So. 2d 368, 375 (Fla. 2004). Here, as discussed above, the Appellant's family was interviewed in connection with his PSI, and none of them mentioned a history of mental illness or traumatic brain injury. In fact, the Appellant, himself, advised that he was in good health and never had a mental health diagnosis. He also told the trial judge during a colloquy that he had never been institutionalized for a mental illness. When his sister testified at sentencing, she only indicated that he had worked consistently. Additionally, the Appellant's videotaped police interview showed that he was able to rationally and logically discuss the offenses without any indication that he did not understand the nature or quality of his actions at the time of the robberies. In fact, he bragged about his crimes. Given this information, the Appellant's fourth and fifth claims were properly denied.

In the Appellant's sixth claim, he argued that his attorney was ineffective for failing to call his sister as an alibi witness. He alleged that she could have testified that the Appellant was at her home at the time of the offenses. He asserted that instead of calling his sister, counsel called the Appellant's girlfriend as a witness, and she has a criminal record. He claimed that if his sister had testified at trial, he would have had an "ironclad" alibi.

The record reflects that the Appellant's girlfriend was called to testify that the Appellant has had a tattoo on his back reading "Emmanuel's Child" since she met him in 2012. She was not asked to provide an alibi during trial, although she had testified at her deposition that the Appellant was with her all night and all day at the time of the offenses, and only left to go to his sister's house on the following morning. This may have been because she also testified at that deposition that the Appellant's nephew called and asked him to participate in the robbery, although she claimed that the Appellant refused his nephew's request.

Instead, defense counsel relied on the Appellant's girlfriend's trial testimony to suggest that the Appellant was not the shirtless

suspect in the surveillance video, as alleged by the State, because the man in the video did not have a tattoo on his back. The State countered this evidence with testimony from a police investigator that it is possible to get a tattoo while in jail. However, the State did not have any definitive evidence proving that the Appellant obtained the tattoo after the robbery.

Given this information, even assuming, *arguendo*, that counsel could be deemed deficient for failing to call the Appellant's sister to testify, the Appellant cannot show prejudice. As discussed above, there was ample evidence of the Appellant's guilt, including his videotaped confession and the in-court identifications of two victims. Under these circumstances, this claim was properly denied.

AFFIRMED.

LEWIS and ROBERTS, JJ., concur.

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

Zethaniah A. Faulk, pro se, Appellant.

Ashley Moody, Attorney General, Tallahassee, for Appellee.