FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4020

WILLIAM RODERICK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Steven B. Whittington, Judge.

November 20, 2019

B.L. THOMAS, J.

Appellant, William Roderick, seeks review of an order denying a postconviction motion brought pursuant to Florida Rule of Criminal Procedure 3.850. For the reasons discussed below, we affirm.

Appellant was charged with two counts of sexual battery upon a child by a person in familial or custodial authority, one count of providing alcoholic beverages to a person under age 21, and one count of resisting arrest without violence. Appellant and the victim are father and daughter. On the night of the incident, Appellant, his mother, and the victim checked into a hotel and reserved two rooms. Appellant and the victim remained in one room while his mother stayed in another. The victim testified that while in the hotel room, Appellant, offered her sips of alcohol and tickled her,

sitting on top of her. The victim asked him to stop but Appellant removed the victim's pants and underwear and took off his underwear. Appellant performed oral sex and sexually penetrated the victim. She eventually managed to run out of the room and into the hotel office for assistance. The hotel clerk testified at trial that he saw a young girl who appeared to be terrified, running and yelling for help. He assisted her and called 911. While in police custody, Appellant could not recall if he had raped his daughter as he had seven drinks that night and did not know how much alcohol the victim drank.

At trial, the Child Protection Team (CPT) officer who examined the victim opined that there was sexual assault or abuse based on the patient history but the physical findings neither confirmed nor negated allegations of sexual abuse. She further testified that an examination could not conclusively determine whether a sexual assault took place. There was no foreign DNA recovered from the sexual assault kit. The defense theory was that the lack of DNA evidence showed that the victim fabricated the sexual battery so she could move out-of-state with her mother, the non-custodial parent.

Ultimately, the Appellant was convicted of his charged offenses. He was sentenced to a total of 25 years in prison to be followed by five years of sexual offender probation. His convictions and sentences were affirmed on appeal. *Roderick v. State*, 120 So. 3d 802 (Fla. 1st DCA 2014). Appellant filed the instant amended rule 3.850 motion, raising seven claims of ineffective assistance of counsel, which the lower court summarily denied.

On appeal, Appellant only challenges the denial of his first, fifth, sixth, and seventh claims. While the Appellant's brief refers to and contains an amalgamation of the factual allegations made in claims two, three, and four, he does not argue the claims therein. Thus, only the first, fifth, sixth, and seventh claims of the motion are subject to review. *See Watson v. State*, 975 So. 2d 572, 573 (Fla. 1st DCA 2008). A claim of ineffective assistance of counsel is governed by *Strickland v. Washington*, 466 U.S. 668, 690 (1984). 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. *See Id.* at 690-92. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The defendant must demonstrate a likelihood of a different result which is substantial and not just conceivable. *Harrington v. Richter*, 562 U.S. 86, 112 (2011). The prejudice in counsel's deficient performance is assessed based on its effect on the results at trial, not its effect on appeal. *Strobridge v. State*, 1 So. 2d 1240, 1241 (Fla. 4th DCA 2009) (citing *Carratelli v. State*, 961 So. 2d 312, 323 (Fla. 2007)).

In Appellant's first claim, he argued that counsel failed to object to the state's expert witness vouching for the credibility of the victim. The testimony at issue involved the expert opinion of the CPT officer who examined the victim. She testified that in her medical opinion there was sexual assault or abuse according to patient history and physical findings that were consistent with the history. Appellant contends that the expert witness improperly vouched for the credibility of the victim.

A claim of ineffective assistance of counsel arguing counsel's failure to object requires that the basis of the objection be credible. *Hitchcock v. State*, 991 So. 2d 337. 361 (Fla. 2008). It is improper for an expert witness to "give the jury the clear impression that the expert believed the child victim was telling the truth." *Geissler v. State*, 90 So. 3d 941, 947 (Fla. 2d DCA 2012); *see also Feller v. State*, 637 So. 2d 911, 915 (Fla. 1994) ("An expert may not directly vouch for the truthfulness or credibility of a witness"). Although the witness did not directly speak to credibility, the expert witness improperly conveyed her conviction that the victim was telling the truth solely based on the patient-reported intake history. Thus, counsel provided deficient performance in failing to object to the CPT officer's testimony.

Although counsel provided deficient performance in failing to object to the improper comments, Appellant fails to show prejudice. *Strickland*, 466 U.S. at 691. Even if the improper testimony had been excluded, there is not a reasonable probability that the outcome of the case would be different. *Harrington*, 562 U.S. at 112 (2011). There was other evidence in the instant case to support the allegation of sexual abuse including, but not limited to, the testimony of the hotel clerk, the victim's consistent account of the incident, and the absence of an affirmative denial by

Appellant who told police he could not remember if he had raped his daughter. Furthermore, the effect of the expert's testimony confirming abuse was mitigated by her subsequent admission that based on the physical examination, she could not determine whether the abuse had taken place. Under these circumstances, the trial court properly denied this claim.

In the Appellant's fifth claim, he argued that he is entitled to a new trial because counsel failed to object when the prosecutor improperly invoked religion in his closing argument. Here, the prosecutor made the following argument:

> And when you're thinking about this case it always brings me back to the story of King Solomon, who was known throughout the ancient kingdom as the wisest of the kings, and it's the famous story of an argument about maternity, who gave birth to a child before DNA existed, two mothers said I am the rightful mother of that child...And the true mother raised her voice and said, no, spare the child, give the child to the other woman, I don't want to see the child hurt. It was at that time that King Solomon knew who the true mother was.
>
> And all that story explains is that people, jurors, should use their God given common sense, should apply wisdom to the analysis of this case. It's very easy to just say, well, there was no DNA, that's not justice and that's not using wisdom.

A prosecutor is permitted wide latitude in closing arguments to argue and draw reasonable inferences from the evidence. *See Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). The proper method to determine the propriety of the comments at issue is to place them in context. *Rose v. State*, 985 So. 2d 500, 508 (Fla. 2008). A conviction will not be overturned unless a prosecutor's comment is so prejudicial that it vitiates the entire trial. *See King v. State*, 623 So. 2d 486, 488 (Fla. 1993).

Given the context of the comments, the prosecutor did not improperly invoke religion. Instead, the prosecutor focused on the jury's ability to assess the victim's credibility despite the fact the case lacked DNA evidence. The comments were a direct response to the defense's theory that the absence of DNA proved the victim

fabricated the assault. Additionally, given the evidence discussed above, the prosecutor's comments were not so egregious that it vitiated the Appellant's entire trial. As such, trial counsel was not deficient in failing to object to these comments. Accordingly, this claim was properly denied.

In the sixth claim of the motion, Appellant argued that counsel failed to object to the prosecutor vouching for the victim's credibility. He alleged that the prosecutor became an unsworn witness when he spoke about the victim's disclosure without relying on any facts in evidence.

"Improper prosecutorial 'vouching' for the credibility of a witness occurs where a prosecutor suggests that she has reasons to believe a witness that were not presented to the jury, or, stated differently, where the prosecutor implicitly refers to information outside the record." *Whigham v. State*, 97 So. 3d 274, 275 (Fla. 1st DCA 2012) (quoting *Jackson v. State*, 89 So. 3d 1011, 1018 (Fla. 4th DCA 2012)). "[W]here the arguments arose in the context of explaining why the jury should find the witness credible based upon the evidence, a prosecutor's comments that a State witness was open, honest, and telling the truth were held to be a valid expression of the prosecutor's opinion." *Bettey v. State*, 244 So. 3d 364, 368 (Fla. 1st DCA 2018).

In the instant case, the prosecutor stated, "it's not very often that fourteen-year-old girls run screaming down the halls in the middle of the night that their dad raped them. It's not very often that you get an immediate disclosure on a father/daughter rape." The prosecutor's suggestion that the victim was credible was a permissible statement. The prosecutor's statement was based on evidence including the testimony of the victim, hotel clerk, and law enforcement officers that responded to the 911 call. One officer, Detective Whitaker, testified that it was common for sex crimes to go unreported, especially in cases involving family members. Thus, there was no basis for an objection, and there was no error. This claim was properly denied.

Lastly, Appellant argued that the cumulative effect of counsel's errors alleged in claims one through six resulted in ineffective assistance. A cumulative error claim must fail where individual claims of error alleged are either procedurally barred or

without merit. *See Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003). Here, since all the individual claims have been denied, there can be no cumulative error.

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.

W. Charles Fletcher, Jacksonville, for Appellant.

Ashley Moody, Attorney General, and Daniel Krumbholz, Assistant Attorney General, Tallahassee, for Appellee.