FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-0466

SAMUEL M. MOSLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
Michael A. Flowers, Judge.

December 6, 2019

B.L. THOMAS, J.

Appellant filed a motion for postconviction DNA (deoxyribonucleic acid) testing of evidence under Florida Rule of Criminal Procedure 3.853. The evidence was collected during the investigation of a brutal rape of a 14-year old girl who was choked into unconsciousness during the crime and suffered extensive hemorrhaging of her eyes and face as well as large bruises on her neck and back. Appellant was convicted at trial of sexual battery with the use of force likely to cause serious personal injury under section 794.011(3), Florida Statutes, with a special finding that he was more than 18-years of age (he was 42-years old at the time of the crime) and the victim was under the age of 18. He had an extensive criminal history, and his scoresheet required a minimum sentence of 30 years in prison. He was sentenced to life in prison.

On appeal, he argued only that the trial court erred in failing to conduct a proper hearing to allow him to discharge his counsel for purposes of sentencing. This Court affirmed his conviction without opinion. *Mosley v. State*, 244 So. 3d 198 (Fla. 1st DCA 2018).

After he filed his unsworn motion for DNA testing, the trial court dismissed the motion because Appellant failed to submit the motion under oath to comply with Florida Rule of Criminal Procedure 3.853. Appellant now argues that the dismissal was in error, as he should have been allowed to amend the motion to comply with the rule. *See Hickey v. State*, 763 So. 2d 1213, 1214 (Fla. 1st DCA 2000). But because the trial transcripts and Appellant's own motion demonstrate that the requested DNA testing would not exonerate him or mitigate his sentence, and his identity as the perpetrator of the sexual battery was not in dispute, we affirm the dismissal. *Gresham v. State*, 181 So. 3d 1207 (Fla. 1st DCA 2015) (finding harmless error in denying motion for DNA testing on merits without requiring State response where it was apparent claims for testing were meritless as it was undisputed that no DNA evidence linked appellant to victim, but other evidence supported conviction); *Menendez v. State*, 41 So. 3d 1066, 1067-68 (Fla. 3d DCA 2010) (although trial court denied motion for DNA testing for wrong reason, court affirmed as evidence sought for testing would not exonerate defendant convicted of murdering a prostitute where he confessed to murder and to paying victim for sex; evidence that prostitute had sex with other men "would not have created a reasonable probability that that movant would have been acquitted or would have received a lesser sentence").

Facts

In 2016, a 14-year-old girl had an argument with her mother in south Alabama. To avoid further arguments, the girl decided to hitchhike to Florida to see a friend. The victim was dropped off late at night in Crestview, about three miles from her friend's home. As she began to walk down the street, Appellant drove near her, honked his horn repeatedly, and when the girl decided to see why Appellant was seeking her attention, he asked her if she wanted some money. Realizing that Appellant was attempting to engage

in prostitution, the victim immediately told him she was only 14-years old and was not a prostitute.

This did not stop Appellant from attempting to engage the young girl, and he continued to offer her money. Thinking that he might be asking her to do a chore, she asked him if he meant that he would pay her to do a chore. She became afraid, and to avoid "something worse from happening" and possibly being "shoved into the trunk," the victim entered Appellant's car and they drove to a car wash so she could vacuum the car. She took two dollars from Appellant to get change for the vacuum, but the machine would not work. The victim returned to Appellant's car, where they engaged in small talk. Appellant then asked her if she had engaged in sex. The victim replied that she had never had sex. When someone Appellant seemed to know drove into the car wash, he immediately drove away from the car wash to park in another area, which made the victim uneasy.

Appellant then began urging the victim to have sex with him. At this point, the victim became very afraid and uncomfortable. She reminded Appellant she was only 14-years old. She told him she did not want to have sex with him and that he could do that with someone else. After he continued to pressure her, she tried to leave the car. Appellant shoved his forearm against her neck, pinning her to the seat, and pulled her back into the car. He choked her until she lost consciousness. When she regained consciousness, Appellant had pulled her pants down and was raping her. The victim cried out, but Appellant screamed at her, telling her to "shut up." When the victim began to cry again, Appellant choked her. "If I didn't stop crying then he would be choking me and then he would give me a few seconds to breathe."

When Appellant finished raping the victim, she managed to get out of the car. He asked her if she wanted him to take her to the police station, but she told him she would not tell anyone what happened and "to stay away from me." She managed to walk to another location where she found a woman working. Barely able to breathe, the victim tried to tell the woman about the sexual battery. The victim got a ride to her friend's house, whose mother quickly realized that the girl had been raped. The friend's mother

called the victim's mother and promptly took the victim to the hospital.

Interviewed at the hospital by an Okaloosa Sheriff's investigator, the victim could barely speak due to the choking injuries to her throat, and the investigator observed that her eyes were "extremely red." She later gave a precise description of Appellant's car interior, including a case in the back seat containing an assortment of compact discs and watches. She described Appellant's gold teeth, long hair, and tattoos. She described the seat covers on the two front seats, including the seat in which she was sexually assaulted. She described the color of the car's interior and the car's wheel rims. At trial, the victim identified Appellant and his car, noting that the car's exterior paint had been changed.*

The jury reviewed photographs of the victim's injuries, taken at the hospital. The photographs showed extensive bleeding in the victim's eyes, called "petechiae," bleeding caused by someone putting extreme pressure on a victim's head and throat. The victim's face also contained extensive petechiae, and her throat and back had large bruises. The emergency-room physician testified that such injuries would have required "major force" used against the victim to cause "blood vessels [to] rupture in the face." The victim's bruising was "consistent with being choked." The victim also had bleeding "underneath her cornea." The victim testified that the bleeding in her eyes lasted about two months.

During the investigation, the victim testified that when presented with the first photographic line-up soon after the crime, which did not contain a picture of Appellant, she did not identify any of the men. When investigators compiled a second photographic line up, the victim immediately identified Appellant, with a gasp. She told the sheriff's investigator that it "scared her" to even see Appellant's image.

The investigator described surveillance evidence recovered from the area showing the victim walking down the street and

* Appellant presented evidence that the car's exterior paint change was planned before the crime.

Appellant's vehicle. The video showed Appellant's vehicle drive into the median and the victim approach the vehicle. The video confirmed the victim's testimony as it showed the victim getting into Appellant's car, being driven to the car wash, and attempting to get change out of the machine at the car wash.

A forensic expert employed by the Florida Department of Law Enforcement testified regarding the DNA samples taken from the victim at the emergency room and later from Appellant. The expert testified that Appellant's DNA was positively identified in samples taken from the victim's vagina and cervix, and no other foreign samples were identified. She further testified that there was no other person in the global population that could have the DNA she identified as Appellant's DNA. She finally testified that she did not test any samples from underneath the victim's fingernails because once the foreign DNA was identified in the victim's "intimate areas" in a sexual-battery investigation, there was no logical reason to test other samples.

Defendant declined to testify. He presented only evidence that he had planned to paint his car before the date of the crime.

In his motion, Appellant asserts that he informed trial counsel that he, in fact, did have sexual relations with the victim, but that it was consensual. He asserts the 14-year old victim was a prostitute, and that he wanted his trial counsel to present evidence that the area of the crime was known to be frequented by prostitutes. Appellant argues in his motion that his attorney should have called a witness who worked in a nearby convenience store to establish this fact. He further asserts that he is entitled to DNA testing of the samples from under the victim's fingernails and her "light-gray panties" because such will show that the girl had sex or a violent encounter with another man, because, he asserts, the young victim was prostituting herself in the area. But Appellant fails to describe the purported "other man" and asserts no evidence that would show the victim had such an encounter.

At trial, none of these defenses were asserted. Nor was the victim cross-examined about a purported sexual encounter with another man. But Appellant firmly maintains his assertion that there is evidence of the 14-year old victim's "pattern of

prostitution," which, together with the untested DNA evidence, would lead any "fair-minded" jury to find Appellant not guilty and establish his factual innocence.

Analysis

Our standard of review is de novo. *See Gosciminski v. State*, 262 So. 3d 47, 55 (Fla. 2018).

Appellant's assertions are unsupported by any facts, any evidence, common sense, or the law. And, because Appellant's assertions are "patently unbelievable," the courts are not required to order further investigation, designed only to humiliate and further traumatize a 14-year-old victim of a brutal rape during which she was choked into unconsciousness.

First, Appellant's assertions are insufficient to require DNA testing under Florida Rule of Criminal Procedure 3.853. That rule requires the movant to *specifically* demonstrate how the evidence would exonerate him. Appellant has failed to do so because he cannot show that identity was a "disputed issue" at trial.

As the supreme court stated:

> [A] defendant's motion must explain how the DNA testing requested will exonerate the defendant or mitigate the defendant's sentence. Fla. R. Crim. P. 3.853(b)(3)-(4). A defendant's motion "is facially sufficient with regard to the exoneration issue if the alleged facts demonstrate that there *is a reasonable probability that the defendant would have been acquitted if the DNA evidence had been admitted at trial*." *Knighten v. State*, 829 So. 2d 249, 252 (Fla. 2d DCA 2002). "The clear requirement of [the] provisions [of rule 3.853] is that a movant ... must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence." *Hitchcock v. State*, 866 So. 2d 23, 27 (Fla. 2004). Further, "the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case." *Id.*

Bates v. State, 3 So. 3d 1091, 1098 (Fla. 2009) (emphasis added).

Here, both the facts and Appellant's own motion completely fail to specifically show that the testing of the samples taken from the victim's fingernails would exonerate him. The evidence at trial conclusively identified Appellant as the perpetrator based on the presence of his DNA from the victim's vagina and cervix, from which no other foreign DNA was recovered. In addition, the victim provided accurate and precise identification of Appellant and his car, where the sexual battery occurred. Furthermore, additional evidence confirmed the victim's descriptions of the incident.

While Appellant now asserts that the untested evidence from underneath the victim's fingernails would somehow show another person attacked the victim, and he now claims he had consensual sex with the victim in exchange for money, he declined to testify at trial to assert these defenses. Nor was any evidence presented of a claimed encounter between the victim and another perpetrator. Thus, there is no "reasonable probability" Appellant could meet the requirements of the rule or the statute. *See Sireci v. State*, 908 So. 2d 321, 325-26 (Fla. 2005) (trial court correctly denied motion for DNA testing under Rule 3.853 where "in light of the other evidence of guilt, there is no reasonable probability that Sireci would have been acquitted or received a lesser sentence [than death]. . .").

In contrast, for example, the Second District held that the movant, convicted of two murders, did make such a showing, where the defendant had been convicted in 1976, no evidence was subjected to DNA testing, the eyewitness testimony was purportedly problematic, and the untested items constituted the corroborating evidence against the defendant. *Riley v. State*, 851 So. 3d 811, 812 (Fla. 2d DCA 2003). Here, we have just the opposite facts. The foreign DNA sample located in the victim's body was positively identified as Appellant's DNA. The victim's precise and unwavering description of Appellant, including her physical reaction to seeing his picture, was corroborated by the collection of his DNA from her body during the rape-kit investigation and the surveillance video showing Appellant's car and the victim at or near the crime scene *at the time of the crime.*

Thus, here, there is no reasonable probability that DNA testing of the evidence taken from under the victim's fingernails would exonerate Appellant:

> Appellant fails to establish how the requested DNA testing of the shotgun would "either exonerate the defendant or mitigate the sentence that [he] received." Fla. R. Crim. 3.853(b)(4); *see Hitchcock v. State,* 866 So.2d 23 (Fla. 2004) (holding that a *rule 3.853* movant must plead with specificity "how the DNA testing ... would give rise to a reasonable probability of acquittal or a lesser sentence"); *Galloway v. State,* 802 So. 2d 1173, (Fla. 1st DCA 2001) (holding that a rule 3.853 motion was facially insufficient where the defendant did not allege facts demonstrating that DNA testing would rule out his guilt).

Davis v. State, 11 So. 3d 977, 978–79 (Fla. 1st DCA 2009); *see also*, *Consalvo v. State*, 3 So. 3d 1014, 1016 (Fla. 2009) (holding that in light of overwhelming evidence of guilt, request for DNA testing was properly denied, as defendant failed to show requested testing would exonerate him and rule requires a plausible assertion that there exists a "'nexus between the potential results of DNA testing on each piece of evidence and the issues in the case.' *Hitchcock*, 866 So. 2d at 27").

Appellant's unsupported claim that the young victim was in fact a prostitute who later had a violent encounter with another unidentified man fails to state a claim under Rule 3.853 that would require the trial court to compel a response from the state or grant relief. There is no evidence whatsoever to assert that this is true. Appellant himself failed to ask the victim on cross examination if, in fact, she had consensual sex with Appellant. Instead, counsel unsuccessfully attempted to introduce evidence that the victim may have had a motive to fabricate the rape accusation because she was concerned about her mother finding out the victim had engaged in sexual relations with her boyfriend. Thus, Appellant fails to explain his contradictory defenses, which shows his motion is meritless. *See Scott v. State*, 46 So. 3d 529, 533-34 (Fla. 2009) (holding defendant's motion for DNA testing was without merit where Scott asserted rationale in motion inconsistent with defense at trial, and motion failed to show reasonable probability that

tested evidence would result in his acquittal). Here, even if someone else's DNA was found under the victim's fingernails, or on her underwear, it would be irrelevant to Appellant's defense at trial, where he did not assert a consensual sexual encounter with the victim.

Just as in *Scott*, "it simply does not make a difference" whether another person's DNA was located under the victim's fingernails or on her underwear, and no evidentiary hearing is required under the facts of the case in light of the unquestioned identification of Appellant by the victim, his DNA located inside the victim's body, other video evidence corroborating the victim's testimony, Appellant's failure to assert a consensual sexual encounter, and a lack of evidence showing the victim had been choked and raped by anyone but Appellant:

> We also conclude that it was not necessary for the trial court to conduct an evidentiary hearing on the motion, as Scott suggests, because no further investigation was necessary to determine that no possible DNA test result could exonerate him or lessen his sentence. It simply does not make a difference in this case whether Scott's blood was present or not. *See Hitchcock,* 866 So. 2d at 27 ("The presence of physical evidence linked to Richard Hitchcock would not establish that Defendant [James Hitchcock] was not at the scene or that he did not commit the murder." (quoting trial court's order)).

Scott, 46 So. 3d at 534 (alteration in original).

Furthermore, the victim's compelling testimony on direct and cross examination would clearly have rebutted any accusation of prostitution, based on her statements to Appellant that she was *not a prostitute*. Thus, in his closing argument, Appellant could only argue that the jury "would never know" what happened in Appellant's car, and that the injuries inflicted on the victim were not serious personal injuries. Because Appellant declined to testify (perhaps because of the possibility he might not be truthful about his prior felony history and thus, open the door to the jury learning he had been convicted of a sexual crime in another state), counsel

had no credible alternative but to attempt to cast doubt on what occurred. But counsel never asserted the victim had agreed to the sexual conduct, and in light of the overwhelming evidence that Appellant's DNA was in her body and that her identification of Appellant was unwavering and corroborated, counsel simply had very little opportunity to contest Appellant's guilt.

In his motion for DNA testing, Appellant attempts to argue that counsel was ineffective for not claiming the young victim was a prostitute, no doubt aware that he made no such arguments at trial. However, a motion for DNA testing under Rule 3.853 is not the proper procedure in which to assert such a claim. *See Figueroa v. State*, 867 So. 2d 627 (Fla. 3d DCA 2004). Appellant must argue that claim in a proper and timely-filed motion under Rule 3.850. Fla. R. Crim. P. 3.850.

Because Appellant's motion for DNA testing fails to show how the requested testing would exonerate him, we affirm the trial court's ruling denying the motion.

AFFIRMED.

ROWE and OSTERHAUS, JJ., concur.

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

Samuel M. Mosley, pro se, Appellant.

Ashley Moody, Attorney General, and Robert Quentin Humphrey, Assistant Attorney General, Tallahassee, for Appellee.