FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1320

JAMES LAMONT DICKERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Mark Borello, Judge.

November 22, 2019

B.L. THOMAS, J.

The Appellant, James Dickerson, appeals a trial court order summarily denying his postconviction motion brought pursuant to Florida Rule of Criminal Procedure 3.850. For the reasons outlined below, we affirm the trial court's ruling.

In between the late night of July 18, 2013 and the early morning of July 19, 2013, the Appellant and his two co-defendants arrived at a Motel 6 where the three victims had been staying. According to one of the victims, the Appellant was responding to a "back page" advertisement that had been placed by one of the victims offering sexual services in exchange for money. The Appellant called ahead to advise the victims of his arrival and arrived at the motel sometime between 3:00 and 4:00 in the early morning, when the third victim had stepped out to go to the store.

Upon entering the room, the Appellant and his co-defendants produced firearms, struck one of the victims in the head with his weapon, forced the victims to strip, and restrained the victims.

Once the victims were restrained, the Appellant and one of his co-defendants proceeded to sexually assault the two victims multiple times while continuing to hold them at gunpoint. During the course of one of these assaults, the Appellant struck one of the victims in the head with the butt of his pistol, and later struck her in the face with his fist.

During the course of these events, the third victim returned from his trip to the store. Upon his return, he was pulled into the room by the Appellant and his co-defendants, struck with a pistol, and restrained. They then robbed him and threatened to kill him. The Appellant attempted to smother one of the initial victims with a pillow, holding it over her face until she had passed out. One of the Appellant's co-defendants attempted to smother the other female victim with a pillow as well. The other victim struggled, and the co-defendant used a pistol to shoot her in the head. The bullet entered the right temple and exited out of the left side of her head. The Appellant and his co-defendants then lit the room on fire and fled.

All three of the victims survived, and the Appellant and his co-defendants were apprehended. He was charged with two counts of attempted first-degree felony murder (counts I and II), one count of attempted voluntary manslaughter (count III), three counts of kidnapping with a weapon (counts IV, V, and VI), two counts of sexual battery with great force (counts VII and VIII), one count of armed robbery (count IX) and one count of arson (count X).

At trial, one of the initial victims testified. She was able to give a detailed description of the Appellant and his co-defendants, and made an in-court identification of them, as well as affirming a previously made identification given to police. The third victim also testified as to his recollection of the events of that night. A redacted videotaped interview between the Appellant and investigators from the Jacksonville Sheriff's Office was also shown to the jury. In this video, the Appellant admitted to being at the motel room and meeting with two of the victims.

On August 21, 2015, a jury found the Appellant and his co-defendant guilty on all counts. The trial court sentenced the Appellant to life in prison for all counts save for count III; and as to count III, the Appellant was sentenced to ten years in prison. The trial court designated the Appellant as a sexual predator in accordance with section 775.21(4)(a), Florida Statutes, and as to counts III and X, the trial court classified the Appellant as a habitual felony offender pursuant to section 775.084(4)(a), Florida Statutes. Lastly, the Appellant was classified as a prison releasee reoffender in accordance with section 775.082(9), Florida Statutes. This Court affirmed the judgment and sentence. *See Dickerson v. State*, 225 So. 3d 802 (Fla. 1st DCA 2017).

The Appellant now raises five claims of ineffective assistance of counsel. To establish a prima facie claim of ineffective assistance of counsel, an appellant must show that trial counsel's performance was deficient and that the deficient performance prejudiced the appellant. *See Strickland v. Washington*, 466 U.S. 668 (1984). Deficient performance is performance which is objectively unreasonable under prevailing professional norms. *Id.* at 688. Prejudice results when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In sum, the Appellant must demonstrate his trial counsel's performance was so deficient as to effectively deny an appellant a fair trial; mere speculation is not sufficient to grant relief. *See Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000); *Strickland*, 466 U.S. at 687.

The Appellant claims that his trial counsel was ineffective because his counsel did not file a motion for a mistrial based on the Appellant's prior criminal record being submitted into evidence. The basis of the claim begins with a series of statements from the prosecutor made during the trial. For example, the prosecutor asked, "[y]ou're the only drug dealer in Jacksonville that goes around and doesn't have a gun?" and "so you're doing all this, you got no gun on you?" The Appellant replied that "[t]here's a lot of people who serve don't have guns" and "I don't carry no gun." In the wake of these statements, the State introduced evidence of the Appellant's prior criminal acts where he had been convicted of being a felon in possession of a firearm. The Appellant claims that

he suffered material prejudice because his character and credibility were the main focus of his trial.

Generally speaking, evidence of a defendant's prior criminal record is inadmissible, but there are exceptions to this rule. § 90.404(2)(a), Fla. Stat. (2019). The supreme court explained,

> [A] testifying defendant may open the door to impeachment with otherwise inadmissible collateral crime evidence by "inaccurately testifying to material facts." To do so, "the defense must first offer misleading testimony or make a specific factual assertion which the state has the right to correct so that the jury will not be misled."

Brookins v. State, 228 So. 3d 31, 37 (Fla. 2017) (citations omitted).

Prior to the introduction of the criminal record into evidence, the defense counsel objected to the State's questioning and a sidebar was held that the jury did not hear. The defense counsel's concern was that while the Appellant had testified that he had been to prison before, he did not open the door for the State to "get up there and talk about every crime [the Appellant's] been charged with or even what he went to prison for." The State countered that when the Appellant testified that he had not been carrying a firearm due to his prior felony convictions, he opened the door for the State to introduce impeachment evidence to rebut his claim, pursuant to section 90.610(1), Florida Statutes. The trial court itself stated in its reasoning during the sidebar that the State "had the right to rebut" the Appellant's claim that his prior felony convictions were the reason he did not carry a firearm. The trial court insisted that it be "limited as much as possible" and that it be tailored in such a way as being akin to "you, [the defendant] just said you would never carry a gun because you just got out of prison. How many prior convictions do you have? Six. Isn't it true that you have been arrested for carrying a gun after one or more of those convictions, or something like that." The transcript attached to the order shows that the State's inquiry was limited in such a fashion, with the prosecutor simply asking the Appellant if he had been convicted of prior felonies, the number of convictions, and if any of those had been for possession of a firearm by a convicted felon.

As a result, it can be clearly seen from the record that the prior convictions were introduced into evidence because the Appellant himself opened the door to have his testimony impeached. The prosecutor introduced the evidence not to show a propensity for criminal behavior, but because the Appellant had stated the reason he would not have been carrying a gun was because he was a convicted felon, and two of these convictions were relevant to demonstrate that based on his past behavior, that would not by itself be a reason for him to not carry a firearm. Thus, no error occurred.

Even if there was an error to some degree in that line of questioning, a mistrial is an extraordinary remedy that a trial court should only grant as an "absolute necessity." *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978). Indeed, a trial court should only grant a motion for a mistrial when "it is necessary to ensure that a defendant receives a fair trial." *Morton v. State*, 972 So. 2d 1088, 1089 (Fla. 5th DCA 2008). Given the extraordinary nature of a mistrial remedy and the fact that the Appellant's own testimony allowed the State to introduce impeachment evidence for the limited purposes of rebutting the Appellant's claim that his felony status was the reason he would not have been carrying a firearm, the trial counsel would have had no basis to move for a mistrial. Trial counsel cannot be held to have been ineffective for not making meritless motions. *See Whitted v. State*, 992 So. 2d 352 (Fla. 4th DCA 2008). Thus, the trial court did not err in denying this claim.

The Appellant argues that his trial counsel was ineffective when she failed to object to the admission of hearsay statements elicited during the testimony of a detective. The detective was questioned by the State and testified about what he did when he arrived at the scene of the crime. The detective explained that he met with one of the victims and described her demeanor, behavior, and his opinion of her physical and emotional state. The detective then went on to testify as to what the victim told him. The Appellant contended that this was inadmissible hearsay.

Generally, an out of court statement being admitted for the truth of the matter asserted is inadmissible hearsay. *See Banks v.*

State, 790 So. 2d 1094 (Fla. 2001). However, there are exceptions to this rule, such as where the statement qualifies as an excited utterance. Florida law defines an excited utterance as "[a] statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." § 90.803(2), Fla. Stat. (2019). In order for an excited utterance to be admissible, the following requirements must be met: (1) there must have been an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must have been made while the person was under the stress of excitement caused by the startling event. *See Livingston v. State*, 219 So. 3d 911, 916 (Fla. 2d DCA 2017).

In the instant matter, the statements in question are contained in the record the trial court attached to its order. The detective testified that the victim in question made statements to him at the scene of the crime while the fire department was still trying to get the fire in the room under control. The detective stated that the victim was bleeding about the face, was acting upset, and that based on his 15 years of experience, the victim appeared to be under the stress of a traumatic event. Thus, the victim's statements were admissible as excited utterances.

Furthermore, the additional statements made to the detective by the victim were in regard to the identification of the Appellant. Section 90.801(2)(c), Florida Statutes, provides an exception to the hearsay rule if the declarant: (1) testifies at the trial and can be subjected to cross examination and; (2) the statements are made for the purposes of identification. Here, the victim made a statement to Detective Watson regarding the identity of her attackers. The victim herself also later testified and was subject to cross examination. As a result, the statements were admissible as statements of identification. The Appellant's trial counsel cannot be held to be ineffective for failing to make objections where she would have had no legitimate grounds to object on. Because the record and the law conclusively refute the Appellant's second claim, the trial court was correct in summarily denying that claim.

The Appellant argued that his trial counsel was ineffective for failing to impeach the State's witness, the third victim, based on the fact that he was under the influence of alcohol and marijuana at the time he observed the Appellant's crimes. The Appellant claimed that his trial counsel should have impeached the witness about his credibility regarding this drug use. The trial court found that this claim was conclusively refuted by the record pursuant to Florida Rule of Criminal Procedure 3.850(f). More specifically, it can be seen in the trial transcript that the witness was questioned by the State about his use of marijuana and ecstasy and he admitted to being on those substances and under the influence of alcohol at or around the time the crime occurred. Defense counsel then cross-examined the witness and brought up the witnesses' drug use, where the witness once again admitted to smoking marijuana, drinking alcohol, and using Molly in the time leading up to when he allegedly witnessed the Appellant's criminal actions.

"If a rule 3.850 motion is facially sufficient, setting forth a cognizable claim for relief, the claim may be denied if the record conclusively refutes the claim; if the claim is denied on this basis, then the trial court must attach to its order of denial those portions of the record that conclusively refute the alleged claim." *Leigh v. State*, 58 So. 3d 396, 398 (Fla. 4th DCA 2011). Here, the trial court attached the relevant portions of the trial transcripts to its order. Based on these attachments, it can be clearly seen that the jury was apprised of the witness' mental state at the time the crimes occurred by both the prosecutor and the defense counsel. The jury would have been able to judge the witness's credibility accordingly. The transcript shows that the trial counsel in fact, did exactly what the Appellant claimed she was deficient for not doing. Defense counsel, therefore, adequately performed her professional duty to the Appellant and the trial court did not err in denying this claim.

The Appellant makes three sub-claims. First, that his trial counsel was ineffective for not severing his trial from that of his brother. Second, that two or more charges were improperly joined or consolidated and that authorized his trial counsel to move for a severance of the charges. Third, the Appellant again claims he was prejudiced by his counsel failing to object to the introduction of the Appellant's own prior criminal record for possession of a firearm.

The Appellant specifically states that his counsel's performance was ineffective because "a reasonable trial counsel would have [severed] the [Appellant's] jury trial by filing a motion for mistrial based on [the Appellant's] prior conviction for possession of a firearm by a convicted felon."

We will first address the matter of severing the Appellant's charges. "Similar offenses charged against a defendant require separate trials unless the crimes are linked in some significant way. The link can include the fact that the crimes occurred during a spree interrupted by no significant period of respite." *Moye v. State*, 898 So. 2d 170, 171 (Fla. 4th DCA 2005) (internal quotations and citations omitted). Here, the crimes at issue all occurred on the same night, at the same location, during the same criminal episode. As a result, there was no legitimate ground for his counsel to move to sever the Appellant's individual charges. *See Fletcher v. State*, 168 So. 3d 186, 203 (Fla. 2015) (holding that a defendant was not entitled to severance of charges of first-degree murder, home invasion robbery, grand theft of a motor vehicle, burglary, and escape because the crimes "were all part of a single and uninterrupted criminal spree, and occurred within a close temporal and geographic proximity.").

As to the Appellant's claim that his trial counsel was defective for not moving to sever his trial from that of his brother, such a claim is without merit. Both the Appellant and his co-defendant testified only to their own innocence and neither of them attempted to implicate the other with their testimony. "The object of the severance rule is not to provide defendants with an absolute right of severance when requested, when they blame each other for the crime, but to assure each of them of a fair determination of his guilt or innocence." *Biscardi v. State*, 511 So. 2d 575, 578 (Fla. 4th DCA 1987) (citing *O'Callaghan v. State*, 429 So. 2d 691, 695 (Fla. 1983)). Even when "there is hostility between the defendants, or that one tries to blame the offense entirely on the other, does not in itself require severance." *Id.* at 579. In the instant matter, given that neither Appellant nor his co-defendant implicated one another and both simply testified as to their own innocence, there would be no grounds under Florida Law to move to sever the trials. The Appellant cannot show prejudice and his trial counsel was not ineffective for failing to file a meritless motion. The trial court did

not err in denying this ground of the Appellant's motion pursuant to rule 3.850(f)(5).

As to the Appellant's claims regarding the introduction of his prior criminal record, we have addressed that matter above in connection with his first claim.

Lastly, in the Appellant's fifth claim of ineffective assistance of counsel, he claims that his counsel failed to object to the admission of a videotaped interview between himself and the Jacksonville Sheriff's Office into evidence. The videotape was redacted, and the Appellant claims that because the video did not contain all that happened, it was not a fair and accurate representation of the incident. We have previously held that "a videotape, like a still photograph, may be admissible if relevant to any issue required to be proven in a case unless it is barred by a rule of exclusion or its admission fails a balancing test to determine whether the probative value is outweighed by its prejudicial effect." *Bryant v. State*, 810 So. 2d 532, 535 (Fla. 1st 2002). In this case, the Appellant made these recorded statements to investigators after the Appellant had been read his constitutional rights and he chose to voluntarily, knowingly, and expressly waive those rights. A defendant's own statements are not excludable as hearsay when the statements are offered against him at trial. *See* § 90.803(18)(a), Florida Statutes. However, a video can be rendered inadmissible if it contains so many redactions that the available portions are deprived of relevance. *See State v. Cummings*, 159 So. 3d 865 (Fla. 3d DCA 2015). In the instant matter, the Appellant lists no specific elements, moments, or other aspects of the video type that were redacted that changed the context of the video or make it misleading to the jury. As to the Appellant's general contention that the jury should have heard and seen the entire videotape to understand what had "actually occurred," the Appellant testified at trial and told the jury his version of events.

Under the standard of *Strickland*, mere speculation is not sufficient to grant relief. *See Maharaj*, 778 So. 2d at 951; *Strickland*, 466 U.S. at 687. The Appellant must demonstrate that his trial counsel objectively fell short of the standards of professionalism, and that he was materially prejudiced to a degree

that, but for that failure, the outcome of his trial would probably have been different. Here, the Appellant does not demonstrate what about the redacted statements were so important that their removal and the instructions to the jury to disregard the redacted portions fundamentally changed the nature of the video. Because of the failure to identify any specific elements that were materially altered by the redactions, and his testimony at trial as to what he alleges actually happened during the redacted portion of the video, the Appellant cannot demonstrate how he was materially prejudiced by any failure to object to this redacted video, nor can he demonstrate how this video materially changed the outcome of his trial in light of the overwhelming evidence against him. As such, the Appellant has failed to meet his burden under the *Strickland* standard and the trial court did not err in denying this claim.

In view of the above, we affirm the trial court's ruling as to all of the Appellant's claims.

AFFIRMED.

OSTERHAUS and BILBREY, JJ., concur.

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

James Lamont Dickerson, pro se, Appellant.

Ashley Moody, Attorney General, Tallahassee, for Appellee.