FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-1353

DUSTIN DUTY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Tatiana Salvador, Judge.

July 15, 2021

PER CURIAM.

Appellant, Dustin Duty, challenges the trial court's denial of his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. In addition to raising a claim of cumulative error, Appellant raised multiple individual claims of ineffective assistance of trial counsel. We find merit in the following claims: 1) failure to investigate and present an alibi witness; 2) failure to impeach a witness; and 3) failure to move to suppress an impermissibly suggestive show-up identification. Having reviewed Appellant's individual claims and considering the cumulative effect thereof, we reverse the denial of the postconviction motion and remand for further proceedings.

Appellant was convicted of robbery with a deadly weapon and sentenced to twenty years in prison. Although Appellant has

consistently maintained his innocence, he was convicted after the victim identified him as the perpetrator in a show-up identification shortly after the robbery and at trial. Since his initial interrogation, Appellant claimed an alibi, no evidence of which was presented at trial. He argues that reversal of his conviction is warranted because trial counsel's performance was so deficient that his constitutional rights were violated. We agree.

To demonstrate counsel was ineffective, Appellant must show (1) deficient performance by counsel and (2) a reasonable probability that the outcome of the proceeding would have been different had counsel not been deficient. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Spencer v. State*, 842 So. 2d 52, 61 (Fla. 2003). Appellant bears the burden of showing that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Strickland*, 466 U.S. at 687, and must, therefore, overcome a strong presumption that counsel exercised reasonable professional judgment in the matter. *See Blanco v. Wainwright*, 507 So. 2d 1377, 1381 (Fla. 1987). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Denial of ineffective assistance of counsel claims are reviewed under a mixed standard of review, where the trial court's factual findings must be supported by competent substantial evidence and legal conclusions are reviewed *de novo*. *Mendoza v. State*, 964 So. 2d 121, 128 (Fla. 2007).

Investigating and Presenting Alibi Witness

Within this framework, we turn first to the claim that Appellant's trial counsel failed to investigate his employer, Mr. Davis, as a possible alibi witness, and to call him as a witness at trial. At the evidentiary hearing, Mr. Davis testified that after working a full day of construction together, he dropped off Appellant at 4:00 p.m. in the area where the subject crime was committed. Per the victim and the 911 call to police, the crime

occurred at approximately 3:30 p.m., providing Appellant with an arguable alibi. Mr. Davis acknowledged that he did not originally recall the exact time he dropped off Appellant and believed that it was sometime between 3:00 and 4:00 p.m. It was not until he acquired and reviewed his phone records, that he was able to pinpoint a more exact time of the drop off. Mr. Davis was able to pinpoint the drop off time because he received a call from police regarding Appellant's arrest at approximately 4:30 p.m. He was confident the drop off occurred thirty minutes prior to the call. Mr. Davis was not able to pinpoint the drop off time until after trial and Appellant's conviction, but before sentencing, when he independently obtained his phone records.

Appellant's trial counsel testified at the evidentiary hearing that he had no knowledge of this phone call from police to Mr. Davis prior to trial. However, the phone call was noted in an investigator's report, completed shortly after Appellant's arrest and was part of trial counsel's file. Mr. Davis was present at the trial and available to testify but was not called as a witness on Appellant's behalf.

In addition to providing Appellant an alibi, Mr. Davis was prepared to testify at trial that when he dropped Appellant off that day, Appellant was shirtless and wearing a tool belt and carrying a backpack—the same attire he was wearing when stopped by officers. Appellant was not wearing a hat as he left it in Mr. Davis's car. Additionally, Mr. Davis would have testified that he gave Appellant eight dollars before he exited the car. When Appellant was stopped by police, he had $2.24 in his possession—the exact change remaining after Appellant purchased a beer and cigarettes at a convenience store shortly before he was detained. In sharp contrast, the victim described the perpetrator as wearing a green hoody jacket and hat. She did not describe a tool belt or backpack. The victim also alleged that $150.00-$200.00 in cash was taken while she was threatened at knifepoint. Neither the green hoodie jacket, the hat, the cash nor the knife were ever located.

This Court recognizes that "[w]hether to call a particular witness to testify at trial is ordinarily a strategic decision committed to the professional judgment of trial counsel, assuming that counsel has conducted a reasonable investigation before

making such a decision." *Mendoza v. State*, 81 So. 3d 579, 581 (Fla. 3d DCA 2012). "An ineffective assistance claim for failure to call a witness to testify at trial must be distinguished from an ineffective assistance claim for failure to reasonably investigate and locate witnesses. Unlike the strategic decision to call a witness to testify at trial, the failure to reasonably investigate and locate witnesses can often serve as a colorable claim of ineffective assistance of counsel." *Id.* (citing *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)).

In denying relief on this claim, the trial court found that Mr. Davis did not advise trial counsel about the call from police until after the verdict. This conclusion is not supported by competent substantial evidence. The phone call from police to Mr. Davis was documented in the investigator's report prepared by trial counsel's office. The circumstances of this call would have more fully solidified the timeline of events and provided Appellant with an alibi. Counsel's failure to reasonably investigate these circumstances prior to trial led to that evidence not being available for presentation at trial. Furthermore, although calling Mr. Davis as a witness at trial would have placed the drop off in the general area of the crime, Appellant's presence in that area was a forgone conclusion as he was detained in the area. Thus, even without the alibi evidence, Mr. Davis's testimony would have placed doubt on the victim's identification, given the difference in attire between the perpetrator and Appellant when he was detained.

The trial court found that in order to prove trial counsel was ineffective for failing to call Mr. Davis, Appellant must prove "that no competent counsel would have made the same decision not to call Mr. Davis to the stand." We agree with Appellant that this is generally true, but not where the investigation into the witness was deficient. The alibi evidence of Mr. Davis was vital considering that the State's case was based solely on the victim's identification. Under these circumstances, we find trial counsel's performance was not that of a reasonably effective attorney. Counsel's failure to reasonably investigate the alibi evidence available through Mr. Davis led to this testimony not being presented at trial. Additionally, we find that counsel was ineffective for failing to present the testimony from Mr. Davis that was otherwise available. Had this testimony been presented to the jury, a reasonable probability exists that the outcome at trial would likely

have been different such that confidence in the outcome is undermined. *Strickland*, 466 U.S. at 694; *Devaney v. State*, 864 So. 2d 85, 88 (Fla. 1st DCA 2003) (failure to call exculpatory witnesses constituted ineffective assistance that cast doubt on defendant's guilt). Therefore, we find reversible error in the trial court's denial of Appellant's claim of ineffective assistance of counsel on this basis.

Impeachment of Witness

Second, Appellant argues trial counsel performed deficiently in failing to impeach Detective Nieto with his videotaped interrogation. At trial, Detective Nieto testified that he was never provided "any specific witnesses by name, like full name, address, phone number or anything like that." He also denied ever being given Mr. Davis's name as an alibi witness. However, during Appellant's videotaped interrogation, Appellant repeatedly asked Detective Nieto to contact Mr. Davis, his employer, and he provided Detective Nieto with Davis's business card from his backpack. Detective Nieto can be seen in the video with the business card in his hand. At the evidentiary hearing on this motion, Appellant's trial counsel explained that he did not impeach Detective Nieto with the video interrogation because of Appellant's repeated use of profanity in the video, including Appellant's use of a profane reference regarding the victim.[1]

The trial court found that Appellant's videotaped interrogation would not have directly impeached Detective Nieto. However, the record belies this conclusion. Strategic decisions do not constitute ineffective assistance of counsel if alternative tactics have been considered and rejected, and counsel's decision was reasonable under the norms of professional conduct. *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). Here, trial counsel's decision was not reasonable under the norms of professional conduct. The interrogation video directly impeaches Detective

[1] Trial counsel also claimed that presenting the interrogation video would have been problematic because it implied there was an alibi witness, but no alibi witness was presented to the jury. However, as explained above, trial counsel should have called Mr. Davis to testify.

Nieto's trial testimony. If the video had been presented to the jury, Detective Nieto's credibility would have been in question. The use of profanity by Appellant does not reasonably raise such a concern that the interrogation tape should not have been used, especially considering the limited amount of evidence available to convict Appellant of the crime charged. Accordingly, the trial court erred in denying Appellant's ineffective assistance of counsel claim on this basis.

Moving to Suppress Identification

Next, Appellant claims trial counsel's performance was deficient because he failed to move to suppress the show-up identification. To succeed on this claim of ineffective assistance of counsel, the defendant must prove the motion is meritorious. *See Zakrewski v. State*, 866 So. 2d 688, 694 (Fla. 2003). A suggestive identification procedure, by itself, does not preclude the out-of-court identification; the evidence is admissible if the out-of-court identification "possesses certain features of reliability." *Simmons v. State*, 934 So. 2d 1100, 1118 (Fla. 2006) (quoting *Grant v. State*, 390 So. 2d 341, 343 (Fla. 1980)). The following test determines whether a suggestive identification procedure should be excluded: "(1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; [and] (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification." *Id.* (quoting *Grant*, 390 So. 2d at 343).

The victim described the perpetrator as a male wearing a grayish, light green sweatshirt; a red ball cap; and cargo shorts. He did not have a backpack. According to the victim, she called 911 only a few minutes after she was robbed at knifepoint. Thereafter, she was told by law enforcement that a suspect, who fit the description of the perpetrator, had been detained, and she was asked to participate in a show-up identification. She was placed in a car and driven to the location where the suspect was being detained. When Appellant was detained by police he was shirtless, wearing a backpack and a construction tool belt. Rather than having Appellant appear as he was when detained, the police had Appellant remove his backpack and tool belt and had him put on a white t-shirt. Appellant was surrounded by several officers at the

time of the identification. During the drive-up identification, the victim indicated to police that Appellant looked "pretty close" to the person who robbed her. An officer instructed her that she needed to be sure, to which the victim responded that she "can't be sure, but, yes, it looks like the guy."

The trial court denied relief here on the basis that trial counsel did not observe anything in the victim's deposition that would indicate law enforcement made suggestive comments or impacted the identification procedure in an impermissible manner. However, the victim's trial testimony detailed otherwise. She testified that the police advised her prior to the show-up identification that they had located someone meeting the description of the perpetrator.

Considering the totality of the circumstances, we find the show-up identification procedures here were unduly and unnecessarily suggestive, and trial counsel should have moved to suppress the show-up identification. At the evidentiary hearing, the victim testified that following the show-up identification, she went to the police station. While there, she was told by officers that the cash stolen from her was not located, but drugs were found on Appellant and that he had probably used her cash to purchase the drugs before being detained.[2] However, there is no evidence in the record that drugs were ever found on Appellant, and he was never charged with a drug related offense. The victim testified that being told this false information about the drugs gave her confidence in her identification. The victim also stated that if she had known before trial about the information regarding Appellant's attire when he was detained and his possible alibi, then she likely would

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[2] When Appellant was detained, he had $2.40 in his possession. According to Mr. Davis, when he dropped off Appellant he gave him $8.00. During his interrogation, Appellant stated that he proceeded straight to the convenience store and purchased a pack of cigarettes and one beer. He urged Detective Nieto to check surveillance cameras at the convenience store and verify his purchase receipt to confirm the exact change remaining from the $8.00 given to him by Mr. Davis. No follow-up was documented by police.

not have confidently identified Appellant as the perpetrator at trial.

Appellant's trial counsel claims that he did not know before trial that the victim was told drugs were found on Appellant, nor was he aware that police had altered Appellant's attire prior to the show-up identification. Thus, he did not move to suppress the identification. Yet had trial counsel questioned the victim appropriately, it is highly likely that this information would have been acquired prior to trial.[3] Lack of adequate questioning does not excuse trial counsel's failure to move to suppress the show-up identification, especially considering that the State's case was founded on the victim's identification.

Because the show-up identification was unduly suggestive, trial counsel's performance was deficient for failing to move for suppression, and the trial court erred in finding otherwise.

Cumulative Error

Lastly, Appellant argues ineffective assistance of counsel based on the cumulative effect of errors discussed above. We agree.

"Where multiple errors are found, even if deemed harmless individually, 'the cumulative effect of such errors' may 'deny to defendant the fair and impartial trial that is the inalienable right of all litigants.'" *Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009) (quoting *Brooks v. State*, 918 So. 2d 181, 202 (Fla. 2005)). Trial counsel's errors, taken together, were so egregious that trial counsel did not provide the assistance of counsel guaranteed to Appellant by the Sixth Amendment. Trial counsel's performance failed to meet the reasonably competent counsel standard under *Strickland*. Furthermore, there is a reasonable probability that but for the errors made by trial counsel, the outcome of the proceeding would have been different. Appellant's claims, taken both individually and cumulatively, demonstrate that he did not

[3] At the evidentiary hearing, the victim testified that at her deposition before trial, trial counsel stated, "let's go ahead and have a seat and get this over with. We all know this is open and shut . . . ."

receive a fundamentally fair trial under the Sixth and Fourteenth Amendments. *See State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996).

The case was predicated on the victim's identification of Appellant as the perpetrator, which should have been thoroughly vetted by Appellant's trial counsel. Appellant was not wearing the same clothes as the perpetrator, and neither the clothes alleged to have been worn, nor the money stolen, were ever located by officers. Additionally, Appellant steadfastly claimed an alibi via Mr. Davis which Appellant's trial counsel failed to effectively investigate and present. Notably, the jury was searching for an alibi, submitting the following question after they began deliberations: "The victim stated her assailant was dressed as a construction worker. Was the defendant employed and did he have an alibi for the time involved?" The trial court responded, "[a]ll the evidence has been presented. You will have to rely on your collective memories of that evidence." This question from the jury emphasizes the critical importance of alibi evidence and the show-up identification in terms of Appellant's appearance when detained.

Due to the individual and cumulative effect of errors, we find Appellant did not receive the representation guaranteed him by the constitution, calling into question his conviction.

For the foregoing reasons, we REVERSE the denial of Appellant's motion for postconviction relief and REMAND for a new trial.

RAY, MAKAR, and M.K. THOMAS, JJ., concur.

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

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