

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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No. 1D21-683

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LANCE E. KIRKPATRICK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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On appeal from the Circuit Court for Duval County.  
Adrian G. Soud, Judge.

August 24, 2022

ROWE, C.J.

Lance E. Kirkpatrick appeals an order summarily denying his postconviction motion filed under Florida Rule of Criminal Procedure 3.850. Kirkpatrick raised nine claims of ineffective assistance of counsel and a claim of cumulative error. Finding no error, we affirm.

*Facts*

In 2012, the State charged Kirkpatrick with first-degree murder, burglary of a dwelling with an assault or battery, and sexual battery with a deadly weapon or great physical force. Kirkpatrick admitted that he killed the victim, but claimed that the murder was not premeditated. The State's theory was that

Kirkpatrick entered the victim's home with the intent to rob her to pay off a drug debt, but then sexually assaulted and murdered her.

The State opened its case with testimony from the victim's husband. He recounted that he had worked a twenty-hour shift and tried to call his wife repeatedly, with no answer. When he returned home the morning after his shift ended, he found his wife naked, lying face down on the floor of their bedroom. Her wrists and ankles were bound with zip ties. She had extensive trauma to her face and had bruises on her breasts and her upper arms. He noticed that the front door was unlocked and that a statue near the door where the couple hid their spare key was overturned.

Next, the medical examiner testified. He explained that the victim's right ankle had a zip tie on it and there were zip ties on both of her wrists. Based on the bruising around the zip ties, the medical examiner concluded that the victim was bound before she died and that she struggled against her bindings. The victim suffered bruises to her shoulder, arm, left breast, and left ear. She had an abrasion on her chin. And she had multiple injuries to her head and eyes.

The medical examiner determined that the victim suffered severe blunt force trauma consistent with being hit multiple times with a pool cue found at the crime scene. The injuries to the victim's face suggested that she had been punched in the mouth. The victim also suffered a one-inch stab wound on her neck while she was alive, which punctured her jugular vein. The stab wound, along with blunt force trauma to her head, caused the victim's death. While there were no physical signs of trauma to the victim's vaginal or anal area, Kirkpatrick's DNA was found in both areas. His DNA was also found under the victim's fingernails and on the zip tie attached to the victim's wrist.

The State's forensic expert testified next. Five bullet holes were detected in the home. The expert determined that the gun shots were fired from the master bedroom, where the victim was found, and into the living room. The bloodstain patterns showed that most of the victim's injuries occurred while she was not standing.

Later, the State presented several witnesses to show Kirkpatrick's activities the night before the murder. These witnesses testified that Kirkpatrick and Terry Norris attended a house party that night and were using drugs. When they ran out of drugs, Norris gave Kirkpatrick about \$200 to purchase more drugs. Kirkpatrick returned with only \$40 worth of drugs.

Melissa Westmoreland testified that Kirkpatrick left the house party in her car. Westmoreland's car was seen in the victim's gated subdivision the day of the murder. The State also presented evidence that Kirkpatrick knew the victim and her husband and that he had stayed before at their home.

Brian Kieffer, Kirkpatrick's roommate, saw Kirkpatrick after the murder and commented on an injury he noticed on Kirkpatrick's hand. Kieffer testified that Kirkpatrick confessed to murdering someone. Kirkpatrick told Kieffer that he went to the victim's home and they fought. He stated that he shattered a pool cue on the victim, then the victim fired five shots at him from a different room in the home. Kirkpatrick confessed that he thought the victim was trying to escape when he heard the victim opening a window in the bedroom. He entered the bedroom, beat the victim, and stabbed her in the neck. Kirkpatrick told Kieffer that he left the house after killing the victim, but returned later to clean the home. Kirkpatrick stated that he did not take any items from the home so the victim's husband would be blamed for the murder.

After Kieffer testified, a detective confirmed that Kieffer knew details about the crime that had not been released to the public.

Defense counsel then moved for a judgment of acquittal. The trial court denied the motion.

Kirkpatrick then testified as the sole witness for the defense. He admitted that he attended the house party with Norris and Westmoreland and that he left the party to buy drugs. He returned with the drugs, but left again to buy pills. After buying the pills, he went to the victim's neighborhood. He claimed that the victim let him into her home. Because it was early in the morning, the victim went back to bed while Kirkpatrick tried to locate some

items he had left in the house. When the victim woke up, she and Kirkpatrick had sex in the victim's bedroom.

Later, Kirkpatrick and the victim argued over whether Kirkpatrick had encouraged the victim's husband to cheat on her. Kirkpatrick said that the victim fired a gun at him, which caused him to grab a pool cue to defend himself. Kirkpatrick swung the pool cue at the victim while struggling for control of the gun. When he realized the victim was unconscious, he restrained the victim with zip ties. He assumed that a neighbor would call the police after hearing the gun shots, so he waited for them to arrive. Deciding that the zip ties would look bad to police, Kirkpatrick tried to cut them with a knife. The victim regained consciousness and struggled for the knife. He assumed that was when she was stabbed. When the police did not arrive, Kirkpatrick left the home.

The defense rested. The jury found Kirkpatrick guilty of first-degree murder, burglary of a dwelling, and sexual battery. The court sentenced him to three consecutive life sentences. This Court affirmed Kirkpatrick's convictions and sentences on direct appeal. *Kirkpatrick v. State*, 227 So. 3d 570 (Fla. 1st DCA 2017) (unpublished table decision).

Kirkpatrick timely filed a second amended postconviction motion collaterally attacking his convictions. The trial court summarily denied the motion. This timely appeal follows.

### *Standard of Review*

Our review of the trial court's order summarily denying Kirkpatrick's postconviction motion is de novo. *Anderson v. State*, 303 So. 3d 596, 598 (Fla. 1st DCA 2020).

### *Analysis*

Kirkpatrick argued in his postconviction motion that his trial counsel rendered ineffective assistance by failing to: (1) prepare for trial, (2) adequately prepare Kirkpatrick to testify, (3) impeach a witness, (4) present experts to reconstruct the events and testify about Kirkpatrick's state of mind, (5) present an expert witness on zip ties, (6) call a medical expert, (7) argue that no evidence

supported the State's theory that Kirkpatrick ripped the victim's underwear, (8) make a facially sufficient motion for judgment of acquittal, and (9) object to improper comments during closing argument. Kirkpatrick also claimed cumulative error.

To prevail on a claim of ineffective assistance of counsel, Kirkpatrick had to show "(1) counsel's performance was outside the wide range of reasonable professional assistance; and (2) counsel's deficient performance prejudiced the outcome of the proceedings so that without the conduct, there was a reasonable probability that the outcome would have been different." *Knowles v. State*, 336 So. 3d 858, 860 (Fla. 1st DCA 2022) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 690–92 (1984)). If Kirkpatrick failed to make the requisite showing on either prong, he would not be entitled to relief on that claim. *Rizkhalil v. State*, 316 So. 3d 802, 804 (Fla. 1st DCA 2021).

#### *Waiver*

Kirkpatrick did not appeal the trial court's summary denial of five claims presented in his postconviction motion. Thus, we affirm the trial court's disposition of those claims without further discussion. *See Watson v. State*, 975 So. 2d 572, 573 (Fla. 1st DCA 2008) ("[W]hen a defendant submits a brief in an appeal from a summary denial of a postconviction motion, this Court may review only those arguments raised and fully addressed in the brief."). We review the trial court's disposition of the four remaining claims, which Kirkpatrick addresses in his brief.

#### *Failure to Properly Advise Kirkpatrick About Testifying*

Kirkpatrick argued that counsel was ineffective for failing to advise him that the prosecutor could impeach him if Kirkpatrick testified that he had never stolen from the victim. This claim fails because Kirkpatrick cannot show prejudice.

Before trial, the State moved to introduce evidence of the gun theft that occurred one month before the murder to show Kirkpatrick's motive to return to the victim's home to steal from her again. The trial court denied the motion.

At trial, during cross-examination, the prosecutor asked Kirkpatrick if he went to the victim's home with the intent to steal from her. He responded that he did not intend to steal from the victim and that he never had to steal from her. The prosecutor then renewed the motion to introduce evidence of the gun theft one month before the murder. The prosecutor argued that Kirkpatrick's testimony opened the door to admission of the prior theft. The trial court granted the motion and allowed the State to present evidence that Kirkpatrick stole a gun from the victim's home before the murder.

Kirkpatrick claims that counsel failed to advise him if he testified about not needing to steal from the victim, then the State could introduce evidence showing that Kirkpatrick had stolen a gun from the victim's home about a month before the murder.

Even assuming that counsel should have advised Kirkpatrick not to mention stealing during his testimony, there is no reasonable probability that the outcome of the trial would have been different if counsel advised Kirkpatrick about the impeachment evidence and that evidence had not been introduced at trial. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) ("The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.").

Along with the evidence of the prior gun theft, the State presented other testimony showing that Kirkpatrick intended to steal from the victim on the night of the murder. Earlier in the evening, Norris testified that he gave Kirkpatrick \$200 to leave the house party to go buy drugs. When Kirkpatrick returned to the house party with only \$40 worth of drugs, Kirkpatrick promised that he would repay Norris the difference. Kirkpatrick then went to the victim's house. Kirkpatrick later admitted to Kieffer that he had done something he would regret and that would send him to prison.

Along with Kirkpatrick's confession to Kieffer that he killed the victim, the State presented evidence that Kirkpatrick's DNA

was found on the zip ties that bound the victim's wrists and under the victim's fingernails from where she struggled against the zip ties. And the blood stain evidence proved that most of the victim's injuries were inflicted mostly when the victim was on her back.

For these reasons, there is no reasonable possibility that the impeachment evidence of the prior theft contributed to Kirkpatrick's convictions. Because Kirkpatrick failed to show prejudice, the trial court did not err when it denied his claim that his counsel was ineffective for failing to advise him that he could be impeached with evidence of the prior theft if he chose to testify.

### *Failure to Hire Experts*

Kirkpatrick next claims that counsel was ineffective for failing to obtain two experts: a crime scene reconstruction expert and a psychological expert. Kirkpatrick alleged that a crime scene reconstruction expert would have testified that Kirkpatrick's testimony fit with the forensic evidence presented by the State, which would have bolstered Kirkpatrick's testimony. He alleged that a psychological expert could have explained Kirkpatrick's state of mind after the victim shot at him five times.

The trial court properly denied relief on these postconviction claims because both claims are facially insufficient. Kirkpatrick did not allege with specificity what information the experts would have been able to offer and how their testimony would have impacted his case. *See Jennings v. State*, 123 So. 3d 1101, 1123–24 (Fla. 2013) (holding that a facially sufficient claim that counsel was deficient for failing to hire an expert requires a defendant to allege with specificity the information the expert would offer and how it would have impacted the case); *Franqui v. State*, 59 So. 3d 82, 96 (Fla. 2011) (“The defendant bears the burden to establish a prima facie case based on a legally valid claim; mere conclusory allegations are insufficient.”). Kirkpatrick had a chance to cure any deficiency in these expert testimony claims when the trial court granted him leave to amend his postconviction motion. Because Kirkpatrick failed to cure these deficiencies in his amended motion, the trial court properly denied this claim. *See Daniels v. State*, 66 So. 3d 328, 330 (Fla. 1st DCA 2011) (holding that a trial

court need not grant more than one opportunity to amend an insufficient motion).

*Failure to Make a Sufficient Motion for Judgment of Acquittal*

Kirkpatrick next claims that his trial counsel was ineffective for failing to make a sufficient motion for judgment of acquittal as to each of the charges against him.

To state a facially sufficient claim of ineffective assistance of counsel for failing to make an adequate motion for judgment of acquittal, “a movant should state sufficient facts to show that ‘[h]e may very well have prevailed on a more artfully presented motion for acquittal based upon the evidence he alleges was presented against him at trial.’” *White v. State*, 977 So. 2d 680, 681 (Fla. 1st DCA 2008) (quoting *Neal v. State*, 854 So. 2d 666, 670 (Fla. 2d DCA 2003)). “A motion for judgment of acquittal should only be granted if there is no view of the evidence from which a jury could make a finding contrary to that of the moving party.” *Jeffries v. State*, 797 So. 2d 573, 580 (Fla. 2001).

As to the first-degree murder charge, Kirkpatrick asserts that counsel should have argued that there was insufficient proof of premeditation. The trial court properly rejected this claim because the State presented ample proof of Kirkpatrick’s premeditated intent to kill the victim.

“Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act about to be committed and the probable result of that act.” *Pearce v. State*, 880 So. 2d 561, 572 (Fla. 2004). Premeditation can be shown by “the nature of the weapon used, . . . the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.” *Id.*

Kirkpatrick admitted that he killed the victim. The medical examiner testified that the victim’s wrists and ankles had zip ties on them and the abrasions on the victim’s wrists showed that she struggled against the bindings. The State presented evidence to show that the victim was on the floor on her back for most of the



attack. Kirkpatrick admitted to his roommate that he shattered a pool cue on the victim and stabbed her in the neck. This evidence is sufficient to show that Kirkpatrick acted with a premeditated intent when he killed the victim. Because the trial court would have denied any motion for judgment of acquittal on this charge alleging lack of premeditation, counsel cannot be considered ineffective. *See Dickerson v. State*, 285 So. 3d 353, 358 (Fla. 1st DCA 2019) (“Trial counsel cannot be held to have been ineffective for not making meritless motions.”).

As to the burglary charge, Kirkpatrick claims that his counsel should have argued that the State failed to prove that Kirkpatrick did not have permission enter the victim’s home. The trial court properly denied this claim because the State introduced evidence that Kirkpatrick was not invited into the home. The victim’s husband testified that a statue next to the front door used to hide the couple’s spare house key was overturned. The State also presented evidence from which the jury could infer that Kirkpatrick entered the house with the intent to steal from the victim to satisfy a drug debt. The victim fired multiple gunshots at Kirkpatrick inside the home, suggesting that he was not welcome in the victim’s home. When viewed in a light most favorable to the State, the evidence supports the State’s argument that Kirkpatrick did not have permission to enter the house. And thus because the trial court would have denied the motion for judgment of acquittal on the burglary charge claiming that Kirkpatrick had permission to enter the home, counsel was not ineffective. *See id.*

As to the sexual battery charge, Kirkpatrick claims that his counsel should have argued that the State failed to prove that the sex between him and the victim was nonconsensual. But the forensic evidence directly refutes Kirkpatrick’s claim. The victim was found nude with zip ties on her wrists and ankles. She had abrasions on her wrists that showed that she struggled against her bindings. The evidence suggested that the victim had Kirkpatrick’s blood and DNA under her fingernails. And a detective found a pair of ripped women’s underwear near a bloody pillow at the crime scene. This evidence, along with Kirkpatrick’s confession to his roommate, casts doubt on Kirkpatrick’s claim that the sex was consensual and was sufficient to submit the charge to the jury. *See Troy v. State*, 948 So. 2d 635, 647 (Fla. 2006) (holding that the

circumstantial evidence was sufficient to present to the jury, given the victim was found completely nude with her underwear and torn bra next to her body, the victim exhibited bruises in the exterior of her vaginal area, and the amount of violence inflicted on the victim). Because any motion for judgment of acquittal would have been denied, counsel cannot be considered ineffective. *See Dickerson*, 285 So. 3d at 358.

### *Failure to Object to Closing Arguments*

Kirkpatrick also claims that his counsel was ineffective for failing to object to two statements the prosecutor made during closing arguments.

First, he argues that his trial counsel should have objected when the prosecutor argued: “Just about everything the defendant told you from the stand was imaginary and unreasonable.” But Kirkpatrick ignores that prosecutors have wide latitude in closing argument to argue and to draw reasonable inferences from the evidence. *See Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982) (“Wide latitude is permitted in arguing to a jury. . . . Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments.”). Counsel may argue credibility of witnesses or any other relevant issue if the argument is based on the evidence. *Miller v. State*, 926 So. 2d 1243, 1254–55 (Fla. 2006). Considering the evidence presented at trial, including Kirkpatrick’s confession, the prosecutor’s statement that Kirkpatrick lacked credibility was not improper. Because any objection by defense counsel would have been meritless, counsel cannot be considered ineffective. *See Hitchcock v. State*, 991 So. 2d 337, 361 (Fla. 2008) (“Counsel cannot be deemed ineffective for failing to make a meritless objection.”).

Second, Kirkpatrick claims that his trial counsel should have objected to the prosecutor’s assertion that Kirkpatrick’s testimony about the victim pulling his hair was not credible because Kirkpatrick had very short hair at the time of the murder. Kirkpatrick correctly asserts that he never testified that the victim pulled his hair. But Kirkpatrick cannot show that there is a reasonable probability that the outcome of his trial would have been different if counsel had objected to this statement. The prosecutor’s misstatement was brief and referenced a very minor

aspect of the case. *See Simpson v. State*, 3 So. 3d 1135, 1147 (Fla. 2009) (holding that very brief improper comments did not amount to fundamental error). Because Kirkpatrick cannot show prejudice, the trial court properly denied this claim.

### *Cumulative Error*

Last, Kirkpatrick argues that the cumulative effect of counsel's errors rendered the trial unfair and constituted a denial of due process. But when "individual claims of error alleged are either procedurally barred or without merit, a claim of cumulative error must fail." *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003). Thus, the trial court properly denied this claim, too.

### *Conclusion*

Because Kirkpatrick failed to show that counsel rendered ineffective assistance of counsel and failed to show cumulative error, we AFFIRM the trial court's order summarily denying the postconviction motion.

ROBERTS and KELSEY, JJ., concur.

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

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Jessica J. Yeary, Public Defender, and A. Victoria Wiggins, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Steven E. Woods, Assistant Attorney General, Tallahassee, for Appellee.