FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-1642

WARREN ALLEN WILLIAMS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Nassau County.
James Daniel, Judge.

December 8, 2022

B.L. THOMAS, J.

Appellant challenges the circuit court's summary denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm the order below.

A jury found Appellant guilty of sexual battery on a person twelve years of age or older but younger than eighteen (victim F.B.R.), lewd or lascivious battery on a person twelve years of age or older but younger than sixteen (victim T.B.T.), and solicitation to commit tampering with a witness or victim (F.B.R. and T.B.T.). The trial court imposed an overall sentence of thirty years in prison followed by ten years of probation with sexual predator conditions. This Court affirmed the judgment and sentence. *Williams v. State*, 274 So. 3d 1063 (Fla. 1st DCA 2019).

At trial, F.B.R. testified that, on New Year's Eve, December 31, 2015, she was at Appellant's trailer, got drunk, and eventually vomited. While she was sick in the bathroom, Appellant started rubbing her leg, and she told him "no" multiple times. She then passed out in the bathroom. She woke up on the couch with people screaming. Her shorts and panties were off, her buttocks were up, and she was leaning on a pillow. Before the incident, F.B.R. had never had sex with Appellant. F.B.R. said that T.B.T. was her best friend and that she knew Appellant because he was in an on-again, off-again relationship with T.B.T. F.B.R. testified that, before New Year's Eve, she was in the trailer and could hear when Appellant and T.B.T. had sex. She had also seen Appellant and T.B.T. come out of his bedroom naked.

T.B.T. testified that, during Christmas break 2015, she lived in Appellant's trailer for about two weeks. During that time, she stayed in Appellant's bedroom and had sex with him. On New Year's Eve, F.B.R. and T.B.T. were at Appellant's trailer drinking alcohol. T.B.T testified that F.B.R. drank almost a whole bottle of brandy and seemed intoxicated. T.B.T. left the trailer for about forty-five minutes. When she came back, F.B.R. was passed out on the couch, eyes closed and buttocks up, with Appellant on top of her. T.B.T. could see that Appellant's penis was in F.B.R.'s vagina. Appellant moved out of the way and said he was sorry many times. T.B.T. went to F.B.R., and F.B.R. was unresponsive. Appellant and T.B.T. got into a fight, and at some point, F.B.R. woke up.

A prior victim, E.P., testified about an incident that took place in February 2014.* She had gone out to a party at a friend's house. She drank alcohol to the point of being sick and then went home. She went to the bathroom to throw up and saw Appellant having sex with her roommate. After vomiting, she went to her room, laid

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* The trial court allowed this testimony, finding it was relevant to prove motive, opportunity, intent, knowledge, and absence of mistake. *See generally Williams v. State*, 110 So. 2d 654, 663 (Fla. 1959) ("[E]vidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion.").

down, and fell asleep. When she woke up, Appellant was on top of her, raping her. She told him to stop, and he said, "tell me you like it and I'll stop."

In the instant appeal, Appellant challenges the postconviction court's ruling on four claims. We will address only the first of these claims. Appellant claimed his trial counsel was ineffective for failing to object and move for a mistrial following an improper comment by the prosecutor on Appellant's decision to exercise his right to remain silent. Defense counsel objected to the relevancy of testimony by a sheriff's deputy that Appellant walked away from police, went inside his residence, and refused to allow police entry when they responded to the dispatch call the night of the incident with F.B.R. In response, the State argued, "it's indicia of guilt when he refuses to talk to the police about what's going on." This comment was made in front of the jury, not at a sidebar conference. The trial court overruled the objection. Another deputy gave similar testimony, defense counsel again objected to relevancy, and the trial court overruled the objection, this time without comment by the State.

Appellant is correct that, based on *State v. Horwitz*, 191 So. 3d 429, 442 (Fla. 2016), a defendant's pre-arrest, pre-*Miranda* silence cannot be used against him as substantive evidence of consciousness of guilt. Although *Horwitz* was issued only six months before Appellant's trial, defense counsel was deficient for failing to object to the prosecutor's comment. Nonetheless, Appellant failed to demonstrate prejudice. To establish prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). There is no reason to think that a properly worded objection and a curative instruction would have changed the outcome of the proceedings. *Compare Floyd v. State*, 159 So. 3d 987, 990 (Fla. 1st DCA 2015) (finding that "there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different" where counsel failed to object to the State's impeachment of the defendant's trial testimony with his post-arrest silence and the defendant relied on a theory of self-defense to which his credibility was key).The jury was presented with the testimony of the two victims of the charged

crimes, a collateral victim, and the mother of Appellant's child to whom Appellant sent a letter from jail asking her to contact the victims, apologize for him, and ask them to change their stories. Given the strong evidence of guilt presented by the State, it is unlikely that a proper objection would have changed the outcome of the trial. Similarly, if defense counsel had moved for a mistrial, there is no reasonable probability that a mistrial would have been granted. *See Chester v. State*, 213 So. 3d 1080, 1082 (Fla. 1st DCA 2012) ("Even when a prosecutor makes an improper comment on a defendant's right to remain silent, a trial court does not abuse its discretion in denying a mistrial where the comment 'was not so prejudicial as to vitiate the entire trial.'" (quoting *Poole v. State*, 997 So. 2d 382, 391 (Fla. 2008)); *Middleton v. State*, 41 So. 3d 357, 360 (Fla. 1st DCA 2010) (holding that where a defendant alleges counsel was ineffective for failing to move for a mistrial, in order to satisfy the prejudice prong of *Strickland*, the defendant must show that the motion for mistrial would have been granted).

Appellant also argues that the postconviction court erred by attaching the entire transcript instead of only the specific, relevant portions. The lower court did not err. The denial order contains an eight-page summary of the relevant evidence, referencing the specific page numbers from the record. Because the relevant portions of the record were referenced in the denial order, attaching the entire transcript did not make the order deficient.

AFFIRMED.

ROBERTS and JAY, JJ., concur.

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

Ryan Edward McFarland of Kent & McFarland, Jacksonville, for Appellant.

Ashley Moody, Attorney General, and Damaris E. Reynolds, Assistant Attorney General, Tallahassee, for Appellee.