FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-1990

PAUL LEE MILES, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Petition Alleging Ineffective Assistance of Appellate Counsel—Original Jurisdiction.

November 30, 2022

B.L. THOMAS, J.

Petitioner alleges his appellate counsel was ineffective during the direct appeal of his criminal conviction. The Court denies the petition on the merits for the reasons outlined below.

For events in 2010, the State charged Petitioner with two counts of sexual battery without the use of physical force. The victim, K.W., alleged that Petitioner met her at an internet cafe before enticing her to come to his home to continue their conversation. K.W. stated she was hesitant, but Petitioner showed her his driver's license and told her that if he intended to do something inappropriate, he would not show her his license. Once at his home, their conversation continued, before Petitioner

abruptly got down on the floor, spread K.W.'s legs, and forcibly removed her pants. K.W. injured her back in the struggle and eventually told Petitioner to "go ahead and do what you want so I can leave." After this, Petitioner had penile-vaginal intercourse with her, before taking her clothes and making her come to his bedroom to get them back.

Law enforcement was also investigating Petitioner for a 2012 sexual assault against another individual, D.M., and learned that Petitioner was involved in K.W.'s 2010 case after they tested K.W.'s sexual assault kit in 2017. Law enforcement spoke to the victim K.W., who stated that she still wished to pursue charges, and a probable cause affidavit was then filed.

The State filed notices of intent to introduce collateral crime evidence under *Williams v. State*, 110 So. 2d 654 (Fla. 1959) (holding that evidence of another crime may be admissible if relevant to prove an issue other than bad character or propensity). This evidence pertained to the sexual battery of four victims from 1999, 2003, 2012, and 2015. Petitioner sought to exclude this evidence, arguing that it was not admissible because these cases were not similar enough to the instant case, were more prejudicial than probative, and would become features of the trial. Ultimately, the State decided not to introduce evidence from the 2003 case, and the trial court excluded two of the other cases after finding that they were not similar enough. Thus, the State introduced evidence of only one collateral crime—the aforementioned 2012 case involving victim D.M. The trial court found that there were sufficient similarities between the instant case and D.M.'s case because both K.W. and D.M. were the same age and ethnicity, both incidents occurred within twenty-four hours of the initial meeting with Petitioner, both incidents occurred at the same location, and there was a similar modus operandi.

During the jury trial, K.W. testified as outlined above. D.M. also testified after the trial court provided appropriate instructions to the jury about *Williams* Rule evidence. D.M. testified that she met Petitioner on a dating website and met him in person twice. The first time they met, she and Petitioner merely talked with one another. The next day when she met him again at his home, Petitioner kept forcibly trying to remove her clothing and tried to

perform oral sex on her. She tried to resist, but Petitioner bit her on the inside of her thigh and then had intercourse with her. When Petitioner finished, D.M. retreated to his bathroom, before eventually leaving his home and heading to the hospital for a medical examination.

Petitioner also testified in his own defense, claiming that the encounter with K.W. was consensual. He testified that she never struggled, fought back, or protested, and that she made statements to him that he took to be consent, including that K.W. stated at one point, "go ahead and do what you want so I can leave."

At the end of the trial, the jury convicted Petitioner on both charges. Petitioner moved for a new trial, arguing he should have been allowed to question law enforcement about the arrest warrant and contesting the trial court's ruling on the *Williams* Rule evidence. The trial court denied the motion and sentenced Petitioner to fourteen years in prison on count I, followed by two years of community control and ten years of sex offender probation on count II.

On appeal, appellate counsel made three arguments: 1) the trial court erred in admitting evidence of a nonconsensual sexual encounter with D.M. because the collateral crime evidence was unfairly prejudicial while providing "scant proof" whether Petitioner and D.M. engaged in consensual sex; 2) the trial court erred in excluding a statement K.W. gave during the initial 2010 investigation that she did not want to move forward with the case; and 3) the trial court erred in precluding defense counsel from cross-examining the lead police detective about omitting material obtained from the 2010 investigation in her 2018 probable cause affidavit. This Court *per curiam* affirmed the convictions and sentences and issued its mandate on July 27, 2021. *See Miles v. State,* 321 So. 3d 698 (Fla. 1st DCA 2021).

Petitioner now contends that his appellate counsel was ineffective for two reasons. First, counsel failed to argue that the trial court committed fundamental error by admitting the collateral crime evidence concerning D.M.'s case because the incident with D.M. occurred two years *after* the charged offense involving K.W. Second, counsel failed to argue that the trial court

erred in prohibiting Petitioner from testifying about K.W.'s state of mind during the incident.

We find that Petitioner's first argument is meritless. The fact that a collateral crime occurred *after* the charged offense does not render evidence of the collateral crime inadmissible. *See Corbett v. State*, 113 So. 3d 965, 970 (Fla. 2d DCA 2013) ("While the *Williams* rule evidence offered in this case involved offenses committed *subsequent* to the charged offenses, this does not render the evidence inadmissible."). Moreover, Petitioner's trial counsel did not raise this argument in the trial court, and so the issue was not preserved. *See Conahan v. State*, 118 So. 3d 718, 733 (Fla. 2013) ("[A]ppellate counsel cannot be deemed deficient for failing to raise meritless issues or issues that were not properly raised in the trial court and are not fundamental error."). Appellate counsel is not ineffective for failing to raise a meritless argument. *See Zack v. State*, 911 So. 2d 1190, 1204 (Fla. 2005).

Petitioner's second argument is equally meritless. Petitioner contends that it was improper for the trial court to allow K.W. to testify with full details about the encounter but prohibit him from testifying about her state of mind at the time of the incident on the grounds that it was hearsay. Under the Florida Evidence Code, an exception to the hearsay rule exists for "[a] statement of the declarant's then-existing state of mind" to be admissible to "[p]rove the declarant's state of mind . . . at that time or at any other time when such state is an issue in the action." § 90.803(3)(a)(1), Fla. Stat. (2019). "This Court has construed the statutory language 'at that time' and held that 'the victim's statements immediately prior to, and at the time of the sexual encounter . . . are relevant to, and are admissible as, evidence of the victim's then existing state of mind regarding the question of . . . consent.'" *Holloway v. State,* 313 So. 3d 146, 148 (Fla. 1st DCA 2020) (quoting *Pacifico v. State*, 642 So. 2d 1178, 1186 (Fla. 1st DCA 1994)).

Our examination of the record shows Petitioner testified in his own defense at trial. During his testimony, he tried to testify about some of the things that the victim K.W. said, and the State objected on hearsay grounds. The trial court called for a sidebar conference, and trial counsel proffered that he was attempting to ask Petitioner if he believed the encounter was consensual. The trial

court said that counsel could elicit testimony about the victim's behavior and how she was acting and told counsel, "[I]f there's a point where she—you know, he said, would you like to have sex and she said yes, I don't think I can exclude that." Despite the State's objections, Petitioner still testified that the K.W. said to him, "go ahead and do what you want so I can leave." He testified that they both participated in the activity, that K.W. willingly came into his bedroom, that they exchanged phone numbers, and that she did not say no or fight him off in any way. Petitioner also testified that when they were in his apartment, she had smiled at him when they had kissed and that he took that to mean that she was enjoying herself. In short, Petitioner testified about the victim's behavior and what she said to him during the encounter—all of which went to her state of mind. As a result, had appellate counsel made this argument, this Court's decision on direct appeal would not have changed as even if any error occurred—which it did not—such asserted error would have been deemed harmless because there is no reasonable probability the evidentiary ruling would have affected the verdict in light of Appellant's testimony and other overwhelming evidence of guilt. *See State v. DiGuilio*, 491 So. 2d 1129, 1138–39 (Fla. 1986).

For these reasons, this Court denies the petition alleging ineffective assistance of appellate counsel on the merits.

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.

Paul Lee Miles, Jr., pro se, Petitioner.

Ashley Moody, Attorney General, Tallahassee, for Respondent.