

Background

Tate was initially charged with one count of aggravated child abuse, one count of first-degree felony murder, and one count of sexual battery following the death of two-and-a-half-year-old H.R., his girlfriend's daughter. Prior to trial, the State dismissed the sexual battery charge, and Tate went to trial solely on the aggravated child abuse and felony murder charges. After a week-long jury trial, Tate was convicted of the two charges, and the trial court sentenced him to life in prison on the murder conviction and to a concurrent thirty years in prison on the aggravated child abuse conviction.

Tate timely filed a direct appeal in this court. In that direct appeal, Tate argued that the trial court committed fundamental error by denying his boilerplate motion for judgment of acquittal and by failing to advise the jury of the possibility of having witness testimony read back to them when they asked only about the availability of transcripts. See Tate v. State, 136 So. 3d 624, 625 (Fla. 2d DCA 2013). This court affirmed Tate's convictions and sentences, concluding in a written opinion that neither error was preserved and that neither constituted fundamental error. Id. Tate then appealed to the supreme court, which denied review. See Tate v. State, No. SC13-2412, 2016 WL 5395765 (Fla. Sept. 27, 2016).

On January 2, 2018, Tate filed a timely rule 3.850 motion that raised six claims for relief. Shortly thereafter and before the postconviction court had taken any action on his motion, Tate filed a motion for leave to file an amended rule 3.850 motion, which the postconviction court granted. In his timely amended motion, Tate raised three claims for relief. In claim one, Tate alleged that trial counsel provided ineffective

assistance by failing to object to the court's proposed response to the jury when it asked about the availability of transcripts of witness testimony. In claim two, Tate alleged that trial counsel provided ineffective assistance by failing to file a motion in limine to exclude as irrelevant two baby wipes that were collected from Tate's home. And in claim three, Tate alleged that trial counsel provided ineffective assistance by failing to redact a videotaped deposition during which it was mentioned that Tate was not present because he was in jail. The postconviction court summarily denied relief on all three claims, and Tate now seeks review of these rulings. As mentioned above, we affirm the summary denial of claim three without further discussion. The disposition of the other two claims, however, requires further discussion.

Claim One

In claim one, Tate alleged that trial counsel provided ineffective assistance by failing to object to the court's proposed response to a jury question. We conclude that while the postconviction court's reasoning in summarily denying this claim was incorrect, its ruling was nevertheless correct.

The record shows, as does this court's opinion on direct appeal, that the parties presented a significant amount of expert testimony during trial. The State presented multiple experts who testified that the injuries H.R. sustained resulted from abuse and could not have resulted from falling while jumping on a couch, as Tate asserted. In contrast, Tate presented multiple experts who testified that H.R.'s injuries were consistent with H.R. falling from the couch and hitting her head. The jury was tasked with sorting out this battle of the experts.

During deliberations, the jury sent out a note asking for an instruction concerning their "access to court transcripts of witness testimony." In response to the question, the trial court told counsel for both parties that it was the court's policy to answer only the specific question asked, and therefore the court proposed to tell the jury only that no transcripts were available and that they would have to rely on their recollection of the testimony. Neither the State nor defense counsel objected to this proposed response, and neither requested that the court tell the jury that it might be possible for them to have the witness testimony read back to them even in the absence of transcripts. Two hours later, the jury returned a guilty verdict.

On direct appeal, Tate argued that the trial court's failure to instruct the jury of the possibility of a read-back of witness testimony constituted fundamental error. This court noted that defense counsel had not objected to the trial court's proposed instruction and therefore held that the alleged error was unpreserved. See Tate, 136 So. 3d at 631. This court also noted that the trial court's instruction was erroneous under the supreme court case of Hazuri v. State, 91 So. 3d 836 (Fla. 2012); however, that case had not been decided as of the time of Tate's trial. See Tate, 136 So. 3d at 631. Further, this court determined that the error did not constitute fundamental error. Id. Thus, this court denied relief on direct appeal.

In his motion for postconviction relief, Tate alleged that trial counsel's failure to object to the court's proposed response constituted deficient performance and that he was prejudiced because, had counsel made such an objection, the error would have been preserved for appellate review and the outcome of his appeal would have been different. In summarily denying relief, the postconviction court concluded:

[T]he Court finds Defendant cannot prove that counsel's failure to make the alleged objection resulted in prejudice when the Second District Court of Appeal concluded that the error did not amount to fundamental error and that Defendant was not entitled to a new trial based on the trial court's erroneous response to the jury's inquiry regarding transcripts.

While this ruling applies the incorrect legal standard to Tate's claim, it does reach the correct result.

When this court considered Tate's argument on direct appeal concerning the response to the jury question, we were required to consider whether the error constituted fundamental error because the error was unpreserved.¹ A fundamental error is one that "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991) (quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960)). We determined that the trial court's failure to advise the jury about the possibility of a read-back, while erroneous, did not meet the legal standard for fundamental error.

When the postconviction court was subsequently tasked with considering Tate's claim of ineffective assistance of counsel arising out of the same error, however,

¹This court noted that the trial court's decision to follow its "policy" and refuse to mention the possibility of a read-back was erroneous based on the supreme court's decision in Hazuri. See Tate, 136 So. 3d 631. Even though Hazuri was not decided by the supreme court until almost a year after Tate's trial, the conflict cases upon which the Hazuri court relied had been decided years earlier and stood for the proposition that a trial court must at least advise the jury of the possibility of a read-back. See, e.g., Barrow v. State, 27 So. 3d 211 (Fla. 4th DCA 2010), approved, 91 So. 3d 826 (Fla. 2012); Avila v. State, 781 So. 2d 413 (Fla. 4th DCA 2001); Roper v. State, 608 So. 2d 533 (Fla. 5th DCA 1992). Therefore, there was case law available to defense counsel at the time of trial that would have supported an objection to the trial court's proposed response to the jury's question.

the legal standard was different. When considering Tate's claim of ineffective assistance of counsel, the question for the postconviction court on the issue of prejudice was whether Tate could "show 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Sanders v. State, 946 So. 2d 953, 956 (Fla. 2006) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Hence, "the test for prejudicial error in conjunction with a direct appeal is very different from the test for prejudice in conjunction with a collateral claim of ineffective assistance." Sanders, 946 So. 2d at 959 (quoting Sanders v. State, 847 So. 2d 504, 506 (Fla. 1st DCA 2003)). And because of these two very different legal standards, the postconviction court erred by simply relying on our decision in the direct appeal to deny Tate's motion for postconviction relief on this claim.

When faced with such an error by the postconviction court, we would normally reverse and remand for the court to reconsider the claim under the proper standard. However, in this case, the record is sufficient for us to determine that Tate was not entitled to relief when his claim is considered under the proper legal standard because he cannot establish prejudice on these facts.

In this appeal, Tate argues that defense counsel's failure to object resulted in prejudice because the issue was not preserved for appellate review. Therefore, he contends, but for counsel's deficient performance, the outcome of the appeal would have been different. However, the question of prejudice in the postconviction setting turns on whether the defendant was prejudiced at trial—not on appeal. See Carratelli v.

State, 961 So. 2d 312, 323 (Fla. 2007) ("[W]e hold that a defendant alleging that counsel was ineffective for failing to object or preserve a claim of reversible error in jury selection must demonstrate prejudice at the trial, not on appeal."). Therefore, Tate's allegation that the outcome of the appeal would have been different does not establish the prejudice necessary to entitle him to postconviction relief.

Alternatively, Tate argues that had trial counsel objected to the proposed instruction at trial, it is possible that the jury would have requested a read-back, possible that the trial court would have permitted it, and then possible that the result of the trial would have been different. But this is pure speculation. First, there is simply no way to know whether the jury would have actually requested a read-back had they been instructed that such was potentially available. Second, even if the jury had been so instructed, Florida Rule of Criminal Procedure 3.410(b)(2) gives the trial court the discretion to deny a request for a read-back even if one is made. Third, even if the trial court had permitted a read-back of some never-identified portion of the transcript, there is no way for this or any court to say that there is an ascertainable and reasonable probability that the outcome of the trial would have been different. Tate's speculative allegations of prejudice do not entitle him to postconviction relief. See Valle v. State, 70 So. 3d 530, 550 (Fla. 2011) (holding that "[p]ostconviction relief cannot be based on speculation or possibility" (quoting Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000))).

Accordingly, while the postconviction court's reasoning underlying its denial of this claim was incorrect, the outcome was nevertheless correct based on the record before this court. We affirm the summary denial of this claim.

Claim Two

In claim two of his motion, Tate argues that trial counsel provided ineffective assistance by failing to file a motion in limine to exclude two baby wipes that the State intended to offer into evidence. Tate alleged that during trial the State presented evidence that tended to show that the baby wipes had H.R.'s blood on them; however, H.R. did not suffer any injuries on the date of her death that involved bleeding or broken skin. Therefore, Tate alleged that the baby wipes were irrelevant to any of the issues before the jury, that the State offered no evidence to show how they were relevant, and that trial counsel was ineffective for failing to move to exclude them from evidence. Tate also alleged that he suffered prejudice because the introduction of these baby wipes could have led the jury to speculate that there was either a pattern of violence in the home or that "someone," presumably him, had been molesting H.R. On the issue of prejudice, Tate alleged that the State discussed the baby wipes during opening statements, testimony, and closing arguments; however, he did not allege what the State actually said about the baby wipes or allege how their exclusion would lead to a reasonable probability that the outcome of the trial would have been different.

Assuming the truth of Tate's allegations, as we must, it appears that trial counsel's performance may have been deficient for failing to move to exclude the baby wipes from evidence after the State dismissed the sexual battery charge. However, Tate's motion does not sufficiently allege prejudice because he does not allege how the State used the baby wipes against him or what arguments the State made relating to them that resulted in prejudice. Therefore, Tate's motion is facially insufficient for failing to include sufficient allegations of prejudice, and he should have been provided with an

opportunity to amend his motion if he could do so in good faith. See Spera v. State, 971 So. 2d 754, 761 (Fla. 2007) (holding that when a defendant's rule 3.850 motion is legally insufficient because it fails to adequately alleged deficient performance or prejudice, "the trial court abuses its discretion when it fails to allow the defendant at least one opportunity to amend the motion").

Rather than providing Tate with an opportunity to amend, the postconviction court denied relief because this court had determined in Tate's direct appeal that there was competent, substantial evidence to support the jury's verdict against Tate. As with the ruling on claim one, however, this ruling did not result from the application of the proper legal standard for a rule 3.850 motion, namely whether the erroneous introduction of these items resulted in a reasonable probability that, but for counsel's ineffectiveness in failing to object, the outcome of the trial would have been different. Because the postconviction court applied the incorrect legal standard, it failed to provide Tate with the necessary opportunity to amend his motion to allege prejudice if he could do so in good faith. Accordingly, we must reverse the summary denial of claim two and remand for the postconviction court to provide Tate with an opportunity to amend this claim if he can do so in good faith.

Conclusion

In sum, we affirm the summary denial of claims one and three of Tate's motion. We reverse the summary denial of claim two and remand with directions to the postconviction court to provide Tate with an opportunity to file an amended claim if he can do so in good faith.

Affirmed in part, reversed in part, and remanded with directions.

SILBERMAN and LUCAS, JJ., Concur.