IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 2012-CF-000171
DIVISION 50: Judge Dennis Craig

v.

PAUL MILLER,

Defendant.
_____/

FINAL ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS MATTER came before the Court for consideration of the Defendant's Amended Motion for Postconviction Relief filed by counsel on November 29, 2016, pursuant to Florida Rule of Criminal Procedure 3.850. The Court, having reviewed the motion, the State's Response, Defendant's Reply, the court file, and arguments presented at an evidentiary hearing, and being fully advised in the premises, hereby finds as follows:

Factual Background

On March 14, 2012, Defendant shot and killed his neighbor, Dana Mulhall. On March 23, 2012, Defendant was charged by Information with one count of second degree murder with a firearm, in violation of sections 775.087(1), 782.04(2), and 790.04(2), Florida Statutes (2012). He was tried before a jury from May 20-24, 2013, and found guilty as charged. The jury made a factual finding that Defendant had discharged a firearm and caused the death of Dana Mulhall. On June 18, 2013, the Court adjudicated Defendant guilty and sentenced him to a term of natural life, with a mandatory minimum of 25 years to be served before release, pursuant to section

775.087(2)(a)3, Florida Statutes (2012). Defendant was represented at trial by Douglas S. Williams, Esq., Carine Jarosz, Esq., and Melissa Moore, Esq.

Defendant appealed to the Fifth District Court of Appeal, case number 5D13-2475. Defendant's judgment and sentence were *per curiam* affirmed, and a Mandate was issued on November 14, 2014. *Miller v. State,* 150 So.3d 1173 (Fla. 5th DCA 2014) (unpublished disposition).

On January 13, 2016, Defendant timely filed a Motion for Postconviction Relief, which included an oath compliant with Rule 3.850(n), requesting that the Court vacate his judgment, conviction, and sentence. Leave to amend the motion was granted four times and the motion was amended four times, with the present Amended Motion filed November 14, 2016, supplemented by Defendant's Amended Motion on November 29, 2016, to include a compliant oath. The State filed a response on January 27, 2017. Defendant replied on April 7, 2017.

In the present motion, Defendant alleges one ground premised on ineffective assistance of counsel. He argues that his trial counsel was deficient for failing to retain and call a "use of force" expert as a defense witness to testify at trial who could have refuted the State's argument that Defendant was not justified in using deadly force. An evidentiary hearing was held on March 9, 2018 and March 22, 2018. Raymond Warren, Esq., Assistant Public Defender, represented Defendant at the hearing, and Mark Johnson, Esq., Assistant State Attorney, represented the State. Defendant called Roy R. Bedard, a "use of force" expert, and Defendant's former counsel Douglas S. Williams, Esq. as witnesses. Defendant introduced a report prepared by Roy R. Bedard entitled "Appelant's [sic] Disclosure of Expert" as Defense Exhibit 1. The State introduced a CD recording of the 911 call made by Defendant on the date of the shooting as State's Exhibit 1. The Court took judicial notice of the court record.

Legal Analysis

To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate (1) that counsel's performance fell below that of reasonably competent counsel, and (2) that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). When considering claims for ineffective assistance of counsel, courts must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689. "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." *Id.* To show prejudice, the *Strickland* standard requires, "a demonstration that the result of the proceeding has been rendered unreliable, and our confidence in the outcome of a proceeding has been undermined by counsel's deficiency." *Thompson v. State*, 990 So. 2d 482, 490 (Fla. 2008).

A defendant must prove both prongs of the analysis and overcome the strong presumption that counsel's conduct was not deficient. *Strickland*, 466 U.S. at 689-90. Because defendants must satisfy both prongs of the *Strickland* standard, when a defendant fails to satisfy one prong, it is not necessary to determine whether he or she has satisfied the other prong. *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001).

In a case of ineffective assistance of counsel, "[j]udicial scrutiny of counsel's performance must be highly deferential" and should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland,* 466 U.S. at 689. "When courts are examining the performance of an experienced trial counsel, the presumption that his

conduct was reasonable is even stronger." *Chandler v. United States,* 218 F.3d 1305, 1316 (11th Cir.2000).

In the one ground claimed in the instant motion, Defendant stated that he was denied effective assistance of counsel at trial because trial counsel failed to retain a "use of force" expert and failed to present the expert as a defense witness at trial. Defendant stated that the key issue at trial was whether Defendant was justified in using force to defend himself. Defendant claimed that a "use of force" expert could have opined that Defendant had an objective fear for his safety, and that the use of force and amount of force used by Defendant were justifiable. Had a "use of force" expert been presented at trial, Defendant argued, the expert would have refuted the State's argument that Defendant was not justified in his use of deadly force.

The State responded that such testimony would have been legally inadmissible at trial if offered by the defense at the time, in that it is generally improper to permit an expert to express an opinion which applies a legal standard to a set of facts. Such testimony, the State submitted, invades the province of the jury by essentially telling the jury how to decide the case.

At the evidentiary hearing commenced on March 9, 2018, Defendant called Roy R. Bedard, President of RRB Systems International. Mr. Bedard stated that he has been listed as an expert in Use of Force and Defensive Tactics by the Florida Department of Law Enforcement, and has testified as an expert for both the State and defense in numerous matters. Mr. Bedard detailed his impressive qualifications and background, including, among other things, his extensive training and education, certifications as a police officer and instructor, and his career in law enforcement and as a field-training officer. The full list of his training and accomplishments is set out in his "Appelant's [sic] Disclosure of Expert" report. The Court accepts that Mr. Bedard is a "use of force" expert. Mr. Bedard described, among other things, the behaviors and psychology associated

with use of force; automatic response; limpic system; panic causes; fight/flight behaviors; and perceptual distortions that could arise from violent events. Mr. Bedard's testimony was a comprehensive, technical discussion about the "use of force". He then applied the discussion to the specific facts and the surrounding circumstances of the instant case and Defendant's use of force against the victim.

At the continuation of the evidentiary hearing on March 22, 2018, Defendant called trial counsel Douglas Williams. Mr. Williams testified that he represented Defendant at the trial level from start to finish. He was assisted by Carine Jarosz, Esq. and Melissa Moore, Esq., but he was lead counsel. During his representation he spoke with Defendant many times. They discussed the theory of his defense, which was self-defense. He took depositions in preparation for trial. He hired and used a private investigator. He filed a motion for the court to authorize him to hire a forensic medical examiner, and participated in discussions with Defendant to help him understand the medical examiner's conclusions. He filed a motion to have a linguist appointed, as he had concerns about how the 911 call made by Defendant would be interpreted, but that testimony was not allowed at trial.

Mr. Williams testified that he does not consider himself an expert in the "use of force." He did not consult with or retain a "use of force" expert because he did not consider it worthy of consideration. He discussed the possibility of using a "use of force" expert with Defendant, as well as the possibility of bringing a "stand your ground" motion. It was his advice to Defendant not to retain a "use of force" expert or bring the "stand your ground" motion for a number of reasons. Mr. Williams felt Defendant would be an excellent witness, as his tone and demeanor appeared very truthful and forthright. Defendant was from the South and had "southern charm". Mr. Williams felt that the testimony of a "use of force" expert would be too technical for the jury,

and an expert using complicated terms would complicate Defendant's testimony. Further, Mr. Williams did not want the State to "have two cracks" at Defendant, as the State might be "better prepared for him the second go around." Finally, he did not believe the presiding judge would grant a "stand your ground" motion. It was a strategic decision based on those factors, and Defendant agreed.

Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected, and counsel's decision was reasonable under the norms of professional conduct. *See Rutherford v. State of Florida,* 727 So.2d 216 (Fla. 1998), where the Supreme Court agreed with the trial court's finding:

> Counsel made the decision to focus on the solid, "Boy Scout" character traits of Mr. Rutherford. The theory was that Mr. Rutherford was a "good ol' fellow" who must have just lost it. That he was really a good guy. The attempt was to make him look as human as possible, to focus on his positive traits.

Id., at 223. *See also, State v. Bolender,* 503 So.2d 1247, 1250 (Fla. 1987) (where the Supreme Court held that the failure of trial counsel to present testimony at trial did not constitute ineffective assistance of counsel, where trial counsel, after checking on trial judge's reputation, concluded that it would have little effect on the trial judge and thus made a determination to follow another strategy.)

The Court finds Mr. Williams' testimony at the evidentiary hearing to be reliable and credible. He has extensive experience in criminal defense, and the Court finds it credible that he would have correctly advised Defendant regarding the law. There was no deficient performance by Mr. Williams. The decision not to retain or present a "use of force" expert was made after a thorough and careful analysis by Mr. Williams. It was a strategic trial decision for which lawyers are given wide latitude. Further, Mr. Williams testified that there was no evidence presented by

Mr. Bedard that he did not know or was unaware of regarding the use of force. Most of the testimony offered by Mr. Bedard, although couched in technical terms, was common sense. There were a few elements that a layperson may not know, but the evidence suggests that at trial Mr. Williams brought out substantially all the facts that Mr. Bedard said were important at trial.

The Court concludes that trial counsel acted in a prudent manner in deciding against retaining or presenting a use of force expert as a witness. Trial counsel's performance did not fall below an objective standard of reasonableness, and this claim therefore fails under the *Strickland* deficiency prong.

Nevertheless, even if, *arguendo,* trial counsel's performance was deficient, Defendant has not demonstrated a reasonable probability that absent trial counsel's errors a different result would occur sufficient to undermine this Court's confidence in the outcome. Failure to present a "use of force" expert's testimony was not prejudicial for several reasons.

First, there was significant evidence against the Defendant, and Mr. Bedard's testimony would have comprised only one of the several factors relied upon by the jury in finding that the murder was not justifiable self-defense. Further, despite the comprehensive, technical discussion about "use of force," the Court finds that the expert testimony would not have substantively augmented the common sense and reasonable knowledge of the average juror, and would not have changed the outcome of the case.

Second, any "use of force" expert testimony would have been offered directly following Defendant's own calamitous testimony, which Mr. Williams testified was "sort of a nail in the coffin." Mr. Williams conceded that trial did not go as he expected; although he had prepared Defendant for his testimony multiple times, his testimony at trial changed when he was cross-examined by the prosecutor, and could be construed as very defensive, aggressive, and

confrontational. On cross, Defendant told the prosecutor she was crazy, called her a smart-aleck, and said some of her questions were stupid questions. Mr. Williams stated he was "taken aback", as he had never seen Defendant respond like that. Mr. Williams stated that any testimony by an expert following Defendant's testimony "would not have saved the day" for Defendant.

Finally, the purpose of the proffered testimony would have been to directly explain and justify Defendant's conduct, which has been ruled inadmissible under Florida law. *See*, *State v. Nazario,* 726 So.2d 349, 350 (3d DCA 1999) (where the court found that expert testimony that the fight/flee syndrome rendered defendant's killing of a victim involuntary was irrelevant and inadmissible.) An expert may not express an opinion which applies a legal standard to the facts, as such is solely within the province of the jury and thus inadmissible. *See, Gurganus v. State,* 451 So.2d 817 (Fla. 1984):

> We find that the opinions the psychologists were asked to give in this case were not the proper subject of expert testimony. The defense was attempting to elicit a bottomline opinion as to whether the actions of Gurganus were those of a "depraved mind" or a "premeditated plan." Both of these terms are legal terms with specific legal definitions. Essentially, the defense was attempting to elicit the psychologists' opinions as to whether Gurganus committed second-degree or first-degree murder. Such a conclusion was a legal conclusion no better suited to expert opinion than to lay opinion and, as such, was an issue to be determined solely within the province of the jury.

Id., at 821. The State's reliance on this case is well-placed. As such, the testimony of Mr. Bedard as a "use of force" expert would have been inadmissible at trial.

The Court finds neither deficiency in Mr. Williams' level of expertise and professional services to Defendant, nor prejudice to Defendant.

In consideration of the foregoing, it is hereby,

ORDERED AND ADJUDGED:

(1) The Defendant's Amended Motion for Postconviction Relief is **DENIED**.

(2) The Defendant has the right to appeal this order within 30 days of its rendition.

DONE and ORDERED in Chambers, Kim C. Hammond Justice Center, Bunnell, Florida this 4th day of April, 2018.

DENNIS CRAIG
CIRCUIT JUDGE

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Copies to:

- Raymond Warren, Esq., Assistant Public Defender
- Mark Johnson, Esq., Assistant State Attorney
- Paul Miller, #V43515, Sumter Correctional Institution (Male), 9544 County Road 476B, Bushnell, Florida 33513-0667

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **PAUL MILLER** by ( ) delivery (X) mail ( ) facsimile on 4/5/18.

Carol Homer
DEPUTY CLERK