IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

BRANDON E. WASHINGTON,

Appellant,

v. Case No. 5D20-725

STATE OF FLORIDA,

Appellee.

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Opinion filed March 26, 2021

3.850 Appeal from the Circuit Court for Flagler County, Dennis Craig, Judge.

Brandon E. Washington, Indiantown, pro se.

Ashley Moody, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Brandon E. Washington, appeals the June 20, 2017 order and interim order of the postconviction court summarily denying Grounds 1–4, 6–12, and 14 of his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief and denying Grounds 5 and 13 of Appellant's motion after an evidentiary hearing.[1] As to Ground 11, we affirm in part and reverse in part. We reverse the summary denial of Grounds 12 and 14. We remand for an evidentiary hearing on those claims only. As to all remaining grounds, we affirm.

In 2011, Appellant was charged with: racketeering (count 1), conspiracy to commit racketeering (count 2), second-degree felony murder (count 3), armed burglary (count 4), and attempted home invasion robbery (count 5). At the end of a seven-day trial, he was found guilty as charged, adjudicated guilty, and sentenced to life in prison. He successfully appealed his conviction of count 5 on double jeopardy grounds, and this Court remanded for the trial court to set aside that conviction. *See Washington v. State*, 120 So. 3d 650, 651 (Fla. 5th DCA 2013).[2]

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[1] Appellant's original notice of appeal, filed March 13, 2020, was untimely; however, this Court granted Appellant's petition for belated appeal in an order issued in May 2020.

[2] This Court's reasoning regarding which of the two similar offenses/counts should have been eliminated on double jeopardy grounds was disapproved of by *State v. Tuttle*, 177 So. 3d 1246 (Fla. 2015).

In Ground 11 of his rule 3.850 motion, Appellant claims that his trial counsel was ineffective for failing to call a number of witnesses that he listed. The Florida Supreme Court has cautioned that an evidentiary hearing is typically warranted when a defendant brings an ineffective assistance claim arguing that trial counsel should have called a witness or alibi witness for trial. *See Jacobs v. State*, 880 So. 2d 548, 553–55 (Fla. 2004). In the absence of an evidentiary hearing, courts must accept a defendant's allegations about what a witness might have said at trial as true unless they are conclusively rebutted by the record and it is improper to summarily dismiss such a ground because the trial court finds that "overwhelming evidence" was submitted at trial. *See id.*

The postconviction court summarily denied this ground after discussing each listed witness. To uphold the summary denial, "the claims must be either facially invalid or conclusively refuted by the record." *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999) (citing Fla. R. Crim. P. 3.850(d)). "[A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the [defendant] is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." *Hird v. State*, 204 So. 3d 483, 484–85 (Fla. 5th DCA 2016) (quoting *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000)).

The court correctly denied Ground 11 and attached appropriate documents conclusively denying the claims to its order with regard to the following witnesses: Tommy Banks, Roberto Bravo, Terrance Leeks, Bianca Dorismond, Joel Ortiz, Alex Decosta, Gerrel Smith, Ancil Oliver, Andrew McCarthy, and Detective Koening. We affirm the court's summary denial as to those witnesses.

However, the documents the postconviction court attached to its order do not conclusively refute Appellant's Ground 11 claims regarding trial counsel not presenting Roberto Bravo, Sandy Hsu, and Wendy Duran as witnesses during the trial. Accordingly, as to those witnesses, we reverse as to Ground 11 for the postconviction court to either attach documents that conclusively refute Appellant's claims or to conduct an evidentiary hearing.

In Ground 12 of his rule 3.850 motion, Appellant argues that his trial counsel was ineffective because he did not secure certain telephone records and a voice mail message that he left for the murder victim. Appellant argues that those records would demonstrate that he was at home during the home invasion, rather than standing by close to the subject house. "[W]here no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." *Hird*, 204 So. 3d at 484–85. "The failure to call a witness can constitute ineffective assistance

of counsel if the witness might be able to cast doubt on the defendant's guilt." *Santos v. State*, 152 So. 3d 817, 819 (Fla. 5th DCA 2014) (citing *Gutierrez v. State*, 27 So. 3d 192, 194 (Fla. 5th DCA 2010)). Furthermore, "[a]lthough defense counsel is entitled to broad deference regarding trial strategy, a finding that some action or inaction by defense counsel was tactical is generally inappropriate without an evidentiary hearing." *Id.* (citing *Hamilton v. State*, 860 So. 2d 1028, 1029 (Fla. 5th DCA 2003)).

If the telephone records and voice mail support Appellant's claim, that evidence would directly contradict the testimony of several of the State's witnesses who claimed Appellant was nearby the house being invaded during the crime. This supposedly conflicting evidence may have undermined the credibility of those who testified against him, which may have led to a different outcome. *See Ciambrone v. State*, 128 So. 3d 227, 234 (Fla. 2d DCA 2013) (reversing summary denial of ineffective assistance of counsel claim alleging that multiple witnesses would have contradicted and impeached testimony of state's witnesses that defendant had abused victim); *Patterson v. State*, 845 So. 2d 311, 312 (Fla. 2d DCA 2003) (reversing summary denial of ineffective assistance claim alleging four witnesses would have impeached state's witnesses and refuted their testimony); *Brooks v. State*, 710 So. 2d 595, 597 (Fla. 1st DCA 1998) (reversing summary denial

of ineffective assistance of counsel claim that witness would have testified that child victim had motive to fabricate allegations).

The records attached by the postconviction court to its order do not conclusively refute these particular claims. Thus, we reverse and remand as to Ground 12 for the postconviction court to attach copies of documents that conclusively refute the claims in Ground 12 or to conduct an evidentiary hearing.

We apply the same reasoning to Appellant's claim in Ground 14, that his trial counsel was ineffective for failing to question Kim Burgos, a witness who testified at trial, about her being with Appellant during the phone calls described above. Appellant further claims that Ms. Burgos would have testified, if asked, that she and Appellant were together the entire day before and during the time the home invasion was underway. Such testimony would have undermined the credibility of the State's witnesses who testified that Appellant had been with them in the hours before and after the burglary. However, it would have also directly contradicted the State's testimony that Appellant helped to plan the burglary with his co-conspirators that day. *See Gutierrez*, 27 So. 3d at 195 (reversing summary denial of ineffective assistance claim that alibi witness would have testified that defendant was with witness entire day when crime took place).

The documents attached to the court's order do not conclusively refute that claim. Thus, we reverse as to that portion of Ground 14 regarding trial counsel's failure to question Ms. Burgos on that topic so that the court can attach documents conclusively refuting Appellant's claim or to conduct an evidentiary hearing.

However, we affirm the postconviction court's summary denial of Appellant's claim in Ground 14 regarding trial counsel's failure to call John Bray as a witness. Appellant made no argument regarding that witness on appeal, thereby waiving any such claim. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) (holding lower court's decisions are presumed correct on appeal and Appellant bears burden of proving decision was incorrect).

Following careful consideration of Appellant's arguments, the State's responses, and the record before this Court, we affirm as to all remaining issues.

AFFIRMED IN PART, REVERSED IN PART, REMANDED for further proceedings.

EVANDER, C.J., EDWARDS and SASSO, JJ., concur.