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

FRANK ROMERO,

Appellant,

v. Case No. 5D18-3004

STATE OF FLORIDA,

Appellee.

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Opinion filed August 2, 2019

3.850 Appeal from the Circuit Court for Brevard County, Nancy Maloney, Judge.

James S. Purdy, Public Defender, and Sean Kevin Gravel, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Douglas T. Squire, Assistant Attorney General, Daytona Beach, for Appellee.

EDWARDS, J.

Frank Romero appeals the postconviction court's denial of his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 in which he asserted ineffective assistance of counsel. We agree that Appellant is entitled to a new trial because his trial counsel's performance was deficient and prejudicial regarding: (1) his

failure to object to a comment by the State in its closing argument that the jury should consider the negative reaction during Appellant's testimony of a witness sitting in the courtroom audience, and (2) his agreement to instruct the jury that it could consider such reactions. On a second point asserted by Appellant, we find that trial counsel's failure to insist upon a read back of testimony where trial transcripts were not available, under the circumstances here, will not support granting a new trial. Thus, for the reasons discussed below, we affirm in part and reverse in part.

BACKGROUND FACTS

Appellant was charged with three felony counts involving a child less than sixteen years old: (1) lewd or lascivious molestation, alleging that he touched the child's buttocks; (2) lewd or lascivious molestation, alleging that he touched the child's breast or clothing covering the child's breast; and (3) lewd or lascivious conduct, alleging that he kissed the child's mouth, lips, or neck. The victim, a friend of Appellant's stepdaughter, testified that when she spent the weekend at Appellant's home in 2010, Appellant gave her a bear hug, repeatedly kissed her, massaged her buttocks, and touched her breasts. According to the victim, Appellant made her and his stepdaughter "pinky promise" not to tell anybody what happened. The victim told her sister and mother what happened. After the mother called the police, a controlled, recorded call between Appellant and the victim took place, during which Appellant asked the victim to forgive him, and said that he did not know what came over him, that it was unintentional, and that what he did had sickened him. Appellant told the victim that he would be in big trouble if she told anybody what he did. During a subsequent recorded police interview, Appellant admitted touching the victim's breast accidently while they wrestled, admitted to kissing her but insisted he was just

kissing a “boo boo” she got during horseplay, and admitted that he gave the victim a massage but denied massaging her buttocks. He told police that the pinky promise was because he did not want his wife to know he had been wrestling with the girls, and he admitted he told them that “what ever happens between us stays between us.”

In addition to the victim testifying to the events described above, another minor testified that while she was vacationing with Appellant and his family he repeatedly grabbed her buttocks, and when she told him to stop, he apologized and said he had not meant to. She testified that he later came up from behind her and grabbed her breasts.[1]

Appellant’s wife testified on behalf of her husband, saying that their family members often give each other massages, that she knew the victim and her daughter were wrestling with her husband on the weekend in question, but that she did not notice anything amiss in any way during that weekend. She specifically said she saw nothing in the victim’s demeanor that indicated anything to be concerned about. As for the other girl, Appellant’s wife said that Appellant had yelled at that girl as she was trying to get in a van with some boys, which made that girl angry at her husband.

Appellant testified, claiming that the kisses he gave the victim were for her boo boos, while denying that he kissed her on the lips as she claimed. Appellant admitted that he gave her a massage, but said it was only up to her knees. He testified that he accidently touched her breast, and denied touching her buttocks. He denied the other girl’s testimony, saying that there was no inappropriate touching. Appellant explained that the pinky promise not to tell was simply part of a frequent family joke or saying, “What

[1] These allegations concern conduct occurring in 2011 and 2012, when Appellant was out on bond awaiting trial.

happens in the van stays in the van," that was a parody of the commercial "What happens in Vegas stays in Vegas."

In closing argument, the prosecutor made the following comment:

> [Appellant] had already pinky promised with her to not tell anyone, because what happens here stays here, which is not what he says on the stand: it was based on a commercial, you know, the Las Vegas commercial. All my family loves that. Anybody look out in the audience when that was going on and see his wife shaking her head no?

Defense trial counsel did not object. During deliberations the jury submitted a question that asked whether witness behavior in the courtroom could be considered evidence, even if the witness was not on the stand. Defense counsel and the prosecutor agreed that such off-the-stand behavior could be considered evidence, and the jury was so advised by the trial court.

The jury then asked if trial transcripts were available for them to review. Initially, defense counsel suggested to the trial court that any testimony of interest could be read back to the jury. However, in the end, defense counsel agreed that the trial court could simply tell the jury that transcripts were unavailable.

The jury convicted Appellant as charged, following which he was sentenced to twenty-five years in prison and lifetime sex-offender probation. His conviction and sentence were affirmed by this Court on direct appeal. *Romero v. State*, 169 So. 3d 1261 (Fla. 5th DCA 2015).

ANALYSIS

In determining whether trial counsel was constitutionally ineffective, a reviewing court must engage in a two-part analysis. First, the reviewing court must determine whether counsel's performance was so deficient that it "fell below the standard

guaranteed by the Sixth Amendment." *Bradley v. State*, 33 So. 3d 664, 671 (Fla. 2010). This is an objective test that asks the court to consider whether counsel was "unreasonable under prevailing professional norms." *Ray v. State*, 176 So. 3d 1010, 1011 (Fla. 5th DCA 2015). Trial counsel's performance must be given "great deference," and the defendant must defeat a strong presumption that counsel's decisions were a matter of "sound trial strategy." *Bradley*, 33 So. 3d at 671 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Valid strategic decisions "do not constitute ineffective assistance of counsel." *Id.* (quoting *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000)).

Second, the reviewing court must determine whether a deficient performance actually prejudiced the defendant. *Id.* at 672. Prejudice means a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is "sufficient to undermine confidence in the outcome," even if the deficient performance "cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. In determining whether a defendant was prejudiced, "a court should presume that the judge or jury acted according to the law." *Downs v. State*, 453 So. 2d 1102, 1108 (Fla. 1984).

A postconviction court's ruling on a claim of ineffective assistance of counsel is subject to a mixed standard of review. *Bradley*, 33 So. 3d at 672. The trial court's findings of fact are reviewed for support by competent, substantial evidence, while its legal conclusions are reviewed de novo. *Id.*

CONSIDERATION OF NONVERBAL OFF-THE-STAND BEHAVIOR

We first consider whether defense counsel's performance was deficient as defined by *Strickland* for his failure to object to the State's invitation for the jury to consider Appellant's wife's off-the-stand reaction to her husband's testimony, and his agreement that the jury should be instructed that it could consider her off-the-stand behavior as evidence. A defendant's "guilt or innocence [must be] determined solely on the basis of the evidence introduced at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *see also Madison v. State*, 189 So. 832, 833 (Fla. 1939) (noting that it is appropriate for the jury to consider "the manner and demeanor of the witness *on the stand*" (emphasis added)); *Cobb v. State*, 126 So. 281, 281 (Fla. 1930) ("[I]n determining the credibility of witnesses the jury might consider their demeanor on the stand while testifying."). A witness's reaction to another witness's testimony is not "evidence introduced at trial," nor is it "the manner and demeanor of the witness [while] on the stand." *See Taylor*, 436 U.S. at 485; *Madison*, 189 So. at 833.

Furthermore, a prosecutor is not allowed to present his or her private observations to the jury as though they were facts. *Courson v. State*, 414 So. 2d 207, 208 (Fla. 3d DCA 1982); *see also Stone v. State*, 626 So. 2d 295, 296 (Fla. 5th DCA 1993) (reversing when prosecutor commented in front of jury that child witness appeared afraid of defendant). Defense counsel unequivocally testified at the postconviction evidentiary hearing that his course of conduct on this topic was not a strategic decision, at all. He testified that he believed it was appropriate for the jury to consider the wife's off-the-stand

reaction to her husband's testimony, that it was fair game for the State's closing argument, and that instructing the jury that it could consider it was likewise not debatable.[2]

This trial, like many, was a credibility contest. Here, between the subject victim and the other girl who testified that she had been similarly molested, on the one hand, and Appellant and his wife on the other hand. To permit the State to attack Appellant's credibility with his wife's off-the-stand reaction to his testimony may have undermined the credibility of both Appellant and his wife. When that is coupled with defense counsel's uneducated agreement to the jury being instructed that it could consider her reaction, defense counsel's performance was "unreasonable under prevailing professional norms." *See Ray*, 176 So. 3d at 1011. Thus, we find that defense counsel's performance was deficient.

Next, we must consider whether this deficient performance was prejudicial to Appellant under the *Strickland* test. There was certainly ample evidence of Appellant's guilt in the form of the testimony of the subject victim and the other victim, the recorded controlled phone call, and the recorded police interview of Appellant. However, Appellant and his wife offered testimony, that if believed, could have supported a different verdict. Appellant's credibility and that of his wife were improperly attacked by the State's comment in closing. The fact that the jury asked during deliberations whether it could consider such off-the-stand witness behavior or reaction as evidence certainly suggests that the State's closing argument and perhaps the wife's nonverbal conduct were on the

[2] Defense counsel also testified that he did not observe Appellant's wife shaking her head negatively during Appellant's testimony; thus, he did not even know if the State's inappropriate comment was factually correct, and he did not know what the jury may have observed that it was allowed to consider as evidence.

jury's collective mind as it considered Appellant's guilt or innocence. The State's argument and the jury's consideration of the wife's non-verbal behavior were only permitted because of defense counsel's deficient performance. The U.S. Supreme Court has held that prejudice exists if counsel's performance was deficient enough to "undermine confidence in the outcome," even if it "cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. Utilizing that test, we find a sufficient likelihood that Appellant was prejudiced by defense counsel's deficient performance. Because he was denied his Sixth Amendment right to effective assistance of counsel, we reverse the order denying this aspect of his postconviction motion and order a new trial.

READBACK OF TESTIMONY WHEN TRANSCRIPTS UNAVAILABLE

Appellant raises the argument that his trial counsel was ineffective for failing to preserve for appeal the trial court's erroneous refusal to read back transcripts to the jury, a per se reversible error. This Court summarized the relevant events in the opinion resulting from Appellant's direct appeal:

> After beginning deliberations, the jury asked a series of questions, one of which was whether transcripts of the testimony were available. The prosecutor and the court responded that transcripts were not available. Although defense counsel suggested that the testimony could be read back, when the trial judge summarized his proposed answers to the various questions propounded—including informing the jury that transcripts were unavailable—defense counsel assented to those answers.

Romero, 169 So. 3d at 1262 (footnote omitted). Noting that the failure to offer to read back trial transcripts is "per se reversible error," this Court nevertheless found that the error had not been preserved for review. *Id.* at 1263. In affirming, this Court relied upon

Gonzalez v. State, 136 So. 3d 1125, 1148 (Fla. 2014), in which the supreme court noted that the failure to object to a trial court's refusal to allow the jury access to transcripts could result in "gamesmanship" if the result were deemed fundamental error, "as defense counsel [could] strategically choose not to object, await the outcome of the trial, and if unfavorable, secure a certain reversal on appeal because of the 'fundamental' error which the judge committed." *Id.* (quoting *Hendricks v. State*, 34 So. 3d 819, 831 (Fla. 1st DCA 2010)). Commendably, Appellant concedes that under Florida law ineffective assistance of trial counsel claims deal with the possibility of prejudice at trial, not on appeal. *See Bradley*, 33 So. 3d at 683 n.20. Therefore, the fact that defense counsel failed to object to a per se reversible error does not amount to prejudice under *Strickland*. *See Strickland*, 466 U.S. at 696 ("[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."). Accordingly, we affirm the postconviction court's denial of this aspect of Appellant's rule 3.850 motion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.

WALLIS and GROSSHANS, JJ., concur.