DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

KALIM NYABINGHI MILLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D19-3355

January 19, 2022

Appeal from the Circuit Court for Charlotte County; George C. Richards, Judge.

Kalim Nyabinghi Miller, pro se.

Ashley Moody, Attorney General, Tallahassee, and Allison C. Heim, Assistant Attorney General, Tampa; and Helene S. Parnes, Senior Assistant Attorney General, Tampa (substituted as counsel of record), for Appellee.

SILBERMAN, Judge.

Kalim Nyabinghi Miller appeals the final order denying his motion for postconviction relief filed under Florida Rule of Criminal

Procedure 3.850 that challenged his convictions for sale or delivery of cocaine and possession of cocaine. He raised eleven claims with multiple subclaims in his rule 3.850 motion. We affirm the order without discussion as to all but one of the subclaims. On the first subclaim of claim 8 ("claim 8.1") concerning juror Grimm, the postconviction court denied relief after an evidentiary hearing. We conclude that Miller is entitled to relief on claim 8.1 based on counsel's failure to exercise a strike for cause against a juror who was actually biased against Miller. Thus, we reverse the order denying postconviction relief and remand for a new trial.

Miller went to trial in 2015. He was represented by lead counsel, who had practiced criminal law since 2004. Cocounsel had practiced criminal law for about two years. Cocounsel conducted voir dire and asked a prospective juror, "Would it bother you if Mr. Miller exercised his constitutional Fifth Amendment right to remain silent and did not testify today?" When cocounsel followed up and asked if anyone "might have an issue with that," prospective juror Grimm responded. She stated: "I've never understood. It always seems like it's an admission of guilt by not speaking." Cocounsel asked, "And when the earlier topic we

discussed about the burden on the State and all those ideas, does that discussion in any way relate to your opinion on this issue?" She responded, "Not really." Grimm was asked no further questions and made no other comments during the remainder of voir dire.

Before the trial court entertained strikes for cause, the court stated for the record that lead counsel had arrived and that both he and cocounsel were present.[1] Grimm was not challenged for cause. During the cause strikes there was no mention of a juror's ability to be impartial based on the defendant's right to remain silent. At the end of jury selection, the court named the jurors, including Grimm, and cocounsel stated that he agreed with the jurors named. When questioned, Miller agreed with the trial court that he had consulted with his attorneys about jury selection. He answered in the affirmative when asked if he agreed with their selections and if the panel was acceptable to him.

At the end of that same day of trial, Miller indicated to the trial court that he did not wish to testify, and the court told him that he could change his mind the next day if he chose to do so. On the

[1] Lead counsel had been selecting a jury in Sarasota.

morning of the second day of trial, Miller had not changed his mind, and he did not testify.

In claim 8.1 of his rule 3.850 motion, Miller alleged that counsel was ineffective for failing to move to strike Grimm from the panel based on her opinion that "[i]t always seems like an admission of guilt by not speaking." In its response, the State conceded that Miller stated a facially sufficient claim and that the claim could not be conclusively refuted by the record. The State acknowledged that Miller was entitled to an evidentiary hearing, and the postconviction court granted an evidentiary hearing on claim 8.1 concerning counsel's failure to move to strike Grimm.

At the evidentiary hearing, Miller testified that Grimm had stated that she thought it was an admission of guilt if he did not testify. Counsel did not ask her further questions about that, did not let Miller know that the defense could strike her, and did not advise him that she "might be a hinderance" if he did not testify. Miller testified that if counsel had told him that he could object to her sitting on the jury and have her stricken, Miller would not have accepted "the panel because this lady is on there." Miller did not recall discussing Grimm with lead counsel.

On cross-examination, Miller testified that at the time of jury selection he did not know that what Grimm had said was a problem and that he was not an attorney. He did not know that he had the option to object to her and to seek to have her stricken.

Cocounsel testified that he was present for and conducted the voir dire. Before accepting the jury, defense counsel gave Miller the jurors' questionnaires and spoke with him to see whether he agreed with the panel. Cocounsel testified that lead counsel will get "a final confirmation" on each juror from a defendant.

On cross-examination, after going over Grimm's comments, cocounsel was asked if he felt that Grimm "should have been challenged," and he said, "well, sure," but explained that if a client were going to testify then the defense might want to keep the juror. Cocounsel concluded, "I don't know how that didn't (unintelligible) stricken just to be safe, but I—but it could have been because the intent was maybe he was gonna testify, I don't know." Cocounsel acknowledged though that "you want to keep your options open at that point." He surmised that maybe "Miller liked this woman irrespective of that." Cocounsel did not recall his discussion with Miller on the subject.

Lead counsel testified that he was not present for voir dire but that he was present when the jurors were being selected. Lead counsel did not recall his consultation with Miller before accepting the jury panel in this case. But he stated that in every case he always talks to his clients and says, "[I]f you don't like someone let us know."

Neither cocounsel nor lead counsel testified that it was a strategic decision to keep Grimm on the jury. There was also no testimony that either attorney explained to Miller that the defense could seek to strike Grimm for cause based on her statement that "[i]t always seems like it's an admission of guilt by not speaking."

In its final order, the postconviction court determined that because Miller had accepted the panel on the record after consulting with counsel, Miller could not "now seek to go behind that prior assertion made under oath to the Court." The postconviction court cited *Kelley v. State*, 109 So. 3d 811, 813 (Fla. 1st DCA 2013), to support the proposition and on that basis denied claim 8.1 as to Grimm.

As in any claim of ineffective assistance of counsel, a claim regarding juror bias has two prongs—deficient performance and

prejudice. *Patrick v. State*, 302 So. 3d 734, 740-41 (Fla. 2020), (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)), *cert. denied*, ___ U.S. ___, 141 S. Ct. 2706 (2021). When a postconviction court denies relief after an evidentiary hearing, we review the court's factual findings for competent, substantial evidence, and we review the court's legal findings de novo. *Id.* at 740. At an evidentiary hearing, the defendant has the burden to prove his postconviction claims. *Campbell v. State*, 247 So. 3d 102, 106 (Fla. 2d DCA 2018). Once a defendant supports a claim of ineffective assistance with competent, substantial evidence, "the burden shifts to the State to present contradictory evidence." *Id.* (quoting *Williams v. State,* 974 So. 2d 405, 407 (Fla. 2d DCA 2007)).

A juror's impartiality "cannot depend on whether an accused criminal defendant will waive the right to remain silent." *Welch v. State*, 189 So. 3d 296, 301 (Fla. 2d DCA 2016). "If a prospective juror will not remain impartial when an accused chooses to exercise the right to remain silent, then that juror should be stricken for cause." *Id.* at 301-02 (stating that equivocal answers concerning the ability to be fair and impartial "will not rehabilitate the kind of partiality each of these prospective jurors had expressed against

Mr. Welch's right to remain silent"). Grimm was of the opinion that when a defendant does not testify "[i]t always seems like it's an admission of guilt." Cocounsel did not rehabilitate her as to this statement, and the defense would have been entitled to a strike for cause.

To prove deficient performance under *Strickland*, a defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Patrick*, 302 So. 3d at 741 (quoting *Strickland*, 466 U.S. at 689). The failure to exercise a strike for cause could be a matter of trial strategy in certain circumstances. *See id.* at 740, 742-43 (noting that although a juror was actually biased against the defendant, the challenged juror was favorable for the penalty phase and favorable on the defense theory that the killing was done in a fit of rage and not premeditated). But here, neither counsel testified that the failure to strike Grimm for cause was a matter of trial strategy.

In fact, the trial transcript clearly reflects that lead counsel was not even present when Grimm made the statement about a defendant who does not testify. Thus, it is unclear if lead counsel was even aware that the statement had been made. Cocounsel

testified that lead counsel customarily will get "a final confirmation" on each juror from a defendant. But lead counsel could not discuss a potential challenge to Grimm if he was unaware of the statement that she made. Lead counsel testified only that he has each defendant make notes and let him know of any potential jurors that the defendant does not like. Lead counsel did not testify about whether he discusses challenges for cause with defendants.

The postconviction court made no finding that the defense was exercising a trial strategy in failing to *strike* Grimm for cause. Based on the trial transcript and the testimony at the evidentiary hearing, there was no reasonable trial strategy that would excuse the failure to strike her for cause. Thus, Miller established the deficient performance prong of *Strickland*.

As to the prejudice prong of *Strickland*, when "a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased." *Brown v. State*, 304 So. 3d 243, 258 (Fla. 2020) (quoting *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007)), *cert. denied*, ___ U.S. ___, 141 S. Ct. 2828 (2021). "Under the actual bias standard, the defendant must demonstrate that the

juror in question was not impartial—i.e., that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record." *Id.* (quoting *Carratelli*, 961 So. 2d at 324).

In *Matthews v. State*, 288 So. 3d 1050, 1064 (Fla. 2019), the record refuted the claim that "a juror who expressed ambivalence during voir dire regarding Matthews' right to remain silent" was actually biased against him. The juror was not biased against Matthews for exercising his right to remain silent because Matthews had testified at trial. *Id.* In addition, the record showed that the juror had been sufficiently rehabilitated. *Id.* at 1065.

In contrast, Grimm made a statement expressing her belief that when a defendant does not testify "[i]t always seems like it's an admission of guilt." Grimm was not rehabilitated, and Miller did not testify at trial. Under these circumstances, the record plainly shows that Grimm was biased against Miller for exercising his right to remain silent. *See also Titel v. State*, 981 So. 2d 656, 658 (Fla. 4th DCA 2008) (determining that a juror was actually biased in a sexual battery prosecution where he was not rehabilitated "after stating that rapists should be executed and that there [had been] an incident in his family").

In denying relief, the postconviction court determined that because Miller accepted the panel on the record after consultation with counsel, he "cannot now seek to go behind that prior assertion" he made to the trial court. The postconviction court relied upon *Kelley*, which involved two jurors who made statements indicating a bias in favor of law enforcement officers they knew who were expected to be witnesses at trial. 109 So. 3d at 812. Counsel did not move to strike those two jurors, and they served on the jury. Notably, counsel did strike four other jurors for cause who testified to a similar bias in favor of officers who were to testify. *Id.*

The First District determined that the "[defendant's] acceptance of the jury despite hearing the testimony of jurors Fowler and Sewell regarding their potential biases serves as a bar to any claim that counsel was ineffective for allowing those jurors to serve." *Id.* at 813. The court concluded that the defendant could not "go behind his representation to the trial court that he was satisfied with the jury by alleging that his counsel was ineffective in jury selection." *Id.* at 814. The First District relied on *Stano v. State*, 520 So. 2d 278, 279 (Fla. 1988), for the proposition that a defendant cannot use a rule 3.850 motion "to go behind

representations the defendant made to the trial court." *Kelley*, 109 So. 3d at 812-13.

The First District later recognized a limitation on that proposition as follows:

> [I]t is error to summarily deny a claim of ineffective assistance of counsel based on counsel's failure to investigate a potential defense or file a motion to suppress evidence where the record attachments do not conclusively show that the defendant was made aware of the potential defense or suppression issue prior to entering the plea.

Brown v. State, 270 So. 3d 530, 533 (Fla. 1st DCA 2019). In doing so, the *Brown* court cited cases from the Second District, such as *Zanchez v. State*, 84 So. 3d 466, 468 (Fla. 2d DCA 2012). 270 So. 3d at 533. In *Zanchez*, this court determined that "the prohibition against going behind the plea announced in *Stano*" did not preclude the claim that defense counsel rendered ineffective assistance by failing to file a motion to suppress when the suppression issue was not specifically addressed at the plea hearing. 84 So. 3d at 468.

Here, Miller testified that he did not know that counsel could have raised a challenge to Grimm based on her statement about a defendant's right to remain silent; if he had known, he would have objected to her being on the jury. Furthermore, in *Kelley*, other

jurors were challenged for cause based on the same type of bias that the two unchallenged jurors expressed. 109 So. 3d at 812. In contrast, at Miller's trial no other jurors were challenged for cause based on the same reason that applied to Grimm—bias regarding the defendant's right to remain silent. Therefore, *Kelley* is distinguishable from the present case.

We conclude that counsel's performance was deficient in failing to strike Grimm for cause and that Miller was prejudiced because she was actually biased against him. Accordingly, we reverse the final order denying postconviction relief as to claim 8.1 and remand for a new trial. *See Titel*, 981 So. 2d at 659 (determining that a juror was actually biased, reversing an order denying postconviction relief, and remanding for a new trial).

Affirmed in part, reversed in part, and remanded for new trial.

MORRIS, C.J., and LaROSE, J., Concur.

Opinion subject to revision prior to official publication.