IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO.: 2009-CF-005311-A-O
DIVISION: 17

vs.

NATHAN PATRICK RYAN,

Defendant.
_______________________________/

ORDER GRANTING GROUNDS 1 AND 4, DENYING GROUND 2, AND DISMISSING GROUND 3 OF "AMENDED MOTION FOR POSTCONVICTION RELIEF" AFTER EVIDENTIARY HEARING, AND VACATING AND SETTING ASIDE JUDGMENT AND SENTENCE

THIS MATTER is before the Court on Defendant's "Amended Motion for Postconviction Relief" filed on December 10, 2013, pursuant to Florida Rule of Criminal Procedure 3.850. After reviewing Defendant's Amended Motion, the State's response, Defendant's reply, Defendant's amendment to Ground 4, Defendant's post-hearing memorandum,[1] the court file, and the record, and hearing the testimony presented at the evidentiary hearing on December 8, 2015, April 7, 2016, and April 8, 2016, the Court finds as follows:

PROCEDURAL HISTORY

On May 13, 2009, Defendant was charged by Information with Sexual Battery (Physically Incapacitated). On February 16, 2010, following a jury trial, Defendant was convicted of the lesser-included offense of Attempted Sexual Battery on a Physically Incapacitated Person, with a special finding that Defendant did not with his penis penetrate the vagina of the victim in commission of the offense. On March 22, 2010, he was sentenced to 60 months in the Department of Corrections with credit for 38 days time served, followed by 60 months of sex offender probation. He appealed, and the Fifth District Court of Appeal *per*

[1] On April 8, 2016, the Court gave Defendant 30 days from receipt of the hearing transcript to file his written arguments, and gave the State 30 days from the date of Defendant's argument to file its response. Defendant filed written arguments on July 13, 2016. To date, the State has not filed a response.

curiam affirmed. *Ryan v. State*, 75 So. 3d 748 (Table) (Fla. 5th DCA 2011). The Mandate was issued on December 12, 2011.

On July 15, 2010, Defendant filed a Motion to Correct Illegal Sentence pursuant to Rule 3.800(a), alleging a scoresheet error. The motion was denied on July 23, 2010. He appealed, and the Fifth District Court of Appeal *per curiam* affirmed. *Ryan v. State*, 49 So. 3d 261 (Table) (Fla. 5th DCA 2010).

On February 19, 2013, Defendant filed a Motion for Postconviction Relief pursuant to Rule 3.850, alleging one claim of ineffective assistance of counsel. On March 12, 2013, the Court granted Defendant leave to amend his motion. He filed his amended motion on December 10, 2013. The State filed a response on July 30, 2014, and Defendant filed a reply on September 18, 2014. On October 16, 2014, the Court entered an order striking Ground 4 of Defendant's amended motion with leave to amend. Defendant filed his amended motion on December 15, 2014. An evidentiary hearing was held on December 8, 2015, April 7, 2016, and April 8, 2016. Defendant filed a post-hearing memorandum on July 13, 2016. This Order follows.

ANALYSIS AND RULING

In the instant Motion, Defendant alleges four claims of ineffective assistance of counsel. Ineffective assistance of counsel claims are reviewed under the two-part standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant has the burden of identifying specific acts or omissions that rendered counsel's performance unreasonable under prevailing professional norms. *Duest v. State*, 12 So. 3d 734, 742 (Fla. 2009). Counsel's errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In addition, Defendant must show that the deficient performance resulted in prejudice, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and Defendant must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. *Id.* at 689.

Ground 1: Defendant contends that counsel was ineffective for failing to present a consent theory of defense and failing to present Detective Vance Voyles as a witness at trial. He claims that the one eyewitness, Danielle Green, told detectives she observed the Defendant and the victim engaging in consensual kissing and having sex; therefore, in light of this statement, the theory of defense should have been consent. He also claims that counsel failed to impeach Ms. Green with her statement to detectives, which was contrary to her trial testimony that the sex was not consensual. He further claims that Detective Voyles' testimony regarding Ms. Green's statement would have impeached Ms. Green's trial testimony and established the sexual activity was consensual, and that Detective Voyles was available to testify. He argues that absent counsel's ineffectiveness, the result of the proceeding would have been different.

Based on the testimony presented at the evidentiary hearing, the Court agrees with the Defendant. Detective Vance Voyles, a sex crimes detective and the lead detective in this case, testified that he met with the victim at the sexual assault treatment center between approximately 5:00 and 6:00 a.m. regarding an incident that occurred at approximately 2:00 a.m. Based on information he received, he expected to see the victim in a volatile, drunk state, but instead she was very quiet, reserved, and did not appear to have been drinking. When he asked the victim why they were there, she responded, "Because Nathan raped me?" with the inflection of it being a question. When he asked her whether the Defendant raped her, she stated, "I don't really know." He stated that he did not think the victim really knew what happened, that it was a "consensual drunk hook-up," and that it was a "miscarriage of justice because I don't think he deserved to spend that much time in jail for this."

Detective Voyles testified that there were various inconsistencies in the victim's behavior and in Ms. Green's statements about what happened that night, and that he would have testified about those inconsistencies had he been called to testify at trial. For example, Ms. Green told

officers at the scene that the victim was passed out and she caught the Defendant having sex with the victim, but later told Detective Voyles that the victim and Defendant were consensually kissing and making out. He stated that he was never contacted by the State or the defense in this case, and he was surprised that he had not be deposed or subpoenaed for trial. He said that this was the very first case in which he had not been called as the lead detective to testify at trial.

Defendant's trial attorney, William Hancock, II, testified that the theory of the defense in this case was that the victim was not incapacitated and consented to the sexual activity. He stated that he focused on the incapacitation portion of the case because he did not think the case was properly charged that way, but that the consent theory "had to be the bottom line" because "that's what [Defendant] was saying." Mr. Hancock acknowledged that he never contacted Detective Voyles about this case or requested the transcripts of his interviews with the victim or Ms. Green.

Defense expert, attorney Michael Kessler, also testified at the hearing. The State filed a motion in limine to preclude his testimony, but the Court permitted him to testify and reserved ruling on the motion until rendition of this Order. According to the case law submitted by the parties, the reasonableness of counsel's actions is a question of law to be decided by the Court and is not a matter subject to expert testimony, though it appears that the Court does have some discretion. *Provenzano v. Singletary*, 148 F. 3d 1327, 1332 (11th Cir. 1998) (holding that "the reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof"); *Freund v. Butterworth*, 165 F.3d 839, 863 n.34 (11th Cir. 1999) (reiterating its holding in *Provenzano*); *Lynch v. State*, 2 So. 3d 47, 82 (Fla. 2008) ("Hypothetically, a situation could exist in which a judge presiding over a postconviction case could receive the testimony of an expert to assist the court in determining whether trial counsel rendered ineffective assistance."); *Mathis v. State*, 973 So. 2d 1153 (Fla. 1st DCA 2006)

(approving the use of a criminal defense attorney as an expert witness during a postconviction evidentiary hearing).

Like the Florida Supreme Court noted in *Lynch*, the undersigned judge is sufficiently familiar with the prevailing norms of criminal representation such that expert testimony is not an essential element to assist this Court in deciding the reasonableness of counsel's representation in this case. *Lynch*, 2 So. 3d at 81-82. The State's motion in limine is therefore granted.

The Court finds, based on the testimony presented at the hearing, that there is a reasonable probability the outcome of the trial would have been different but for counsel's deficiencies. Ground 1 is therefore granted.

<u>Ground 2:</u> Defendant contends that counsel was ineffective for failing to impeach the victim with her inconsistent statements to law enforcement officials and/or present exculpatory information. He claims that the incident report indicated the victim stated she was a virgin, but the sexual assault forensic form completed by the victim at the hospital indicated she had consensual sex within fourteen days. He argues the victim's credibility was a key issue in this case and, absent counsel's ineffectiveness, the result of the proceeding would have been different.

In its response, the State argues that Defendant failed to explain how the victim's testimony would be admissible in view of the Rape Shield statute, which the State expressly invoked at trial.

This claim was not addressed at the evidentiary hearing. In his post-hearing memorandum, Defendant asserts that he relies on the arguments contained in his amended motion and reply. In his reply, Defendant claims that the sexual assault forensic form "can be construed as the alleged victim admitting to the nurse examiner that she cheated on her boyfriend."

A review of the trial transcript shows that the Court granted the State's motion in limine under section 794.022(2), Florida Statutes, to exclude reference to the victim's prior sexual activity. (*See* Jury Trial Tr. at 10-11.) Thus, the Court finds that this testimony would not have been admissible at trial, and counsel therefore cannot be deemed deficient for failing to present this testimony. Ground 2 is denied.

Ground 3: Defendant contends that counsel was ineffective for failing to object to the incomplete written jury instructions that were provided to the jury.

At the December 8, 2015 evidentiary hearing, Defendant agreed that this claim was conclusively refuted by the record and voluntarily dismissed the claim.

Ground 4: Defendant contends that counsel was ineffective for failing to retain a toxicologist and present the toxicologist as a defense witness at trial. He claims that a key issue in this case was whether the victim was physically intoxicated, and toxicologist Lawrence Masten would have refuted an essential element in this case by testifying that the victim was not physically incapacitated at the time of the sexual encounter. He argues that absent counsel's ineffectiveness, the result of the proceeding would have been different.

Based on the testimony presented at the evidentiary hearing, the Court agrees with the Defendant. Based on Dr. Lawrence Masten's review of this case and his knowledge of toxicology, he opined that the victim was not physically incapacitated. He concluded, based on the trial testimony, that the victim had a blood alcohol concentration ("BAC") of .13 to .15 at the time of her interaction with the Defendant. He testified that a person's BAC would have to be between .35 and .50 to be physically incapacitated. Dr. Masten stated that although the victim had enough alcohol in her system that it affected her behavior to some degree, and that she would have had some mental decrement, there was nothing physical that would have prevented her from being able to move and she would have had the ability to resist or flee.

The State's toxicology witness, Dr. Bruce Goldberger, testified that based on his review of this case, the victim had an estimated BAC of .20 within an hour of her consumption of alcohol, which is consistent with someone who is incapacitated by alcohol. He defined "incapacitated" as someone who is in and out of consciousness and cannot protect themselves or participate in activity. On cross-examination, however, he stated that although the victim would be incapacitated at the .20 level, she would not be *physically* incapacitated. He stated that four hours after consumption (at the approximate time of her interaction with the Defendant), the victim had an estimated BAC of .155 and could have been incapacitated to some degree. He testified that at that four-hour mark, the victim was still impaired but it is possible that she was not incapacitated and could consent to sexual activity.

The Court finds, based on the testimony presented at the hearing, that there is a reasonable probability the outcome of the trial would have been different but for counsel's deficiencies. Ground 4 is therefore granted.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. Grounds 1 and 4 of Defendant's "Amended Motion for Postconviction Relief" are **GRANTED**, Ground 2 is **DENIED**, and Ground 3 is **DISMISSED**.

2. The judgment and sentence rendered on March 22, 2010, are **VACATED** and **SET ASIDE**.

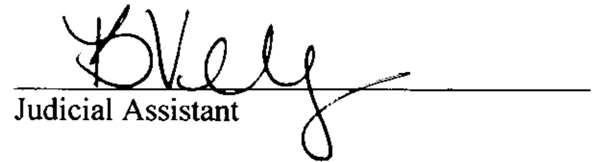
3. A Status Hearing is scheduled for the 30th day of September, 2016, at 10:30 a.m./p.m. in Courtroom 9-A.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 23rd day of September, 2016.

ALAN S. APTE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has been furnished by U.S. Mail or hand delivery to **Michael Ufferman**, Attorney for Defendant, Michael Ufferman Law Firm, P.A., 2022-1 Raymond Diehl Road, Tallahassee, Florida 32308; **Kenneth Nunnelley, Assistant State Attorney**, Post Office Box 1673, 415 North Orange Avenue, Suite 200, Orlando, Florida 32801; and to **Omar Rijos**, Correctional Probation Specialist, Florida Department of Corrections, 501 South Calhoun Street, Tallahassee, Florida 32399-2500, on this 23rd day of September, 2016.



Judicial Assistant