

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

STATE OF FLORIDA,

Plaintiff,

vs.

JAMES ROBERT WARD,

Defendant.

CASE NO.: 2009-CF-13977-A-O

DIVISION: 14

**ORDER GRANTING RELIEF ON GROUND 1 OF DEFENDANT'S MOTION FOR
POSTCONVICTION RELIEF AND DENYING REMAINING GROUNDS**

THIS MATTER came before the Court on Defendant's Motion for Postconviction Relief filed on July 31, 2014, pursuant to Florida Rule of Criminal Procedure 3.850. After reviewing Defendant's Motion, the State's June 10, 2015 Response, Defendant's June 19, 2015 Reply to the State's Response, the State's August 12, 2015 Supplemental Response, Defendant's August 25, 2015 Reply to the State's Supplemental Response, the court file, and the record, and having held an evidentiary hearing on October 6, 2015, the Court finds as follows:

PROCEDURAL HISTORY

On September 24, 2011, following a jury trial, Defendant was found guilty of second degree murder with a firearm. On December 16, 2011, Defendant was sentenced to 30 years in the Department of Corrections with a 25 year minimum mandatory. Defendant's judgment and sentence was affirmed on appeal with the mandate issued on August 9, 2013. *Ward v. State*, 145 So. 3d 121 (Fla. 5th DCA 2013). Defendant's Motion for postconviction relief was deemed filed on July 31, 2014. The State filed a Response to the Motion on June 10, 2015, and Defendant filed a Reply to the Response on June 19, 2015. The State filed a Supplemental Response on August 12, 2015, and Defendant filed a Reply to the State's Supplemental Response on August

25, 2015. On September 10, 2015, the Court entered an order denying part of Defendant's Motion and granting an evidentiary hearing on the remaining grounds of the Motion. An evidentiary hearing was held on October 6, 2015.

ANALYSIS AND RULING

In the instant Motion, Defendant raises eight grounds for postconviction relief, totaling 30 specific claims. In order to demonstrate ineffective assistance of counsel, Defendant must show deficient performance by counsel, and that he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In demonstrating prejudice, Defendant must "show 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. At an evidentiary hearing, "when a defendant presents competent substantial evidence in support of his ineffective assistance claim, the burden shifts to the State to present contradictory evidence." *Williams v. State*, 974 So. 2d 405, 407 (Fla. 2d DCA 2007). The Court adopts and incorporates by reference its findings and rulings made in the September 10, 2015 Order and at the October 6, 2015 evidentiary hearing. *See* Order attached. The Court will now address the remaining grounds.

Ground One: Failure to Object and Move for Mistrial based on Improper State Evidence and Argument Commenting on Defendant's Right to Remain Silent. Defendant alleges that counsel was ineffective for failing to object and move for mistrial based on improper evidence and argument from the State commenting on his right to remain silent. He claims that the State repeatedly introduced testimony and evidence that Defendant exercised his right to counsel, invoked his right to silence, and that Defendant had elected not to discuss the details of the incident. Defendant alleges that there were more than 25 instances of improper comment but counsel never objected and that if counsel had objected then there is more than a reasonable probability of a different outcome.

(1A). Defendant asserts that the first improper evidence on his right to remain silent came from Deputy Quincy Alleyne (“Deputy Alleyne”). Defendant claims that Deputy Alleyne testified that he and Defendant did not speak during the hour and a half that Defendant was handcuffed outside of his house, but that while the two of them spoke about football and Defendant’s daughters on the ride from Defendant’s house to the Orange County Sheriff’s Office (“OCSO”), Defendant did not mention his wife, the victim.

(1B). Defendant asserts that another instance of improper evidence of his right to remain silent occurred when the State elicited testimony from Defendant’s brother-in-law, Glenn Saare (“Mr. Saare”), about a call that Defendant made to Mr. Saare while Defendant was in custody at OCSO. Defendant claims that the State elicited information from Mr. Saare that Defendant did not tell him what happened that night.

(1C). Defendant alleges that another instance of improper evidence occurred when the State introduced a edited 32 minute videotape of Defendant in custody at OCSO which contained at least eight instances establishing that Defendant had exercised his right to remain silent and his right to counsel. He claims prior to opening statements, counsel informed the Court that counsel had not reviewed the video but there may have been objectionable comments on his clients right to remain silent; however, as the trial continued, counsel never returned to his argument, reviewed the video prior to it being admitted, or objected to the video.

(1D). Defendant alleges that an improper comment on his right to remain silent occurred at 00.00-00.34 when Defendant stated that he would rather wait, in response to law enforcement’s request that he submit to a gunshot residue test. Defendant alleges that it was clear that he was saying he would rather wait for his attorney. He claims that law enforcement told him he did not have choice to wait and that counsel failed to object or move for mistrial.

(1E). Defendant claims that another instance of improper evidence occurred at 08.36-15 46 in the video when Defendant was talking to Mr. Saare and Defendant would not specifically respond to Mr. Saare's questions about what happened. Defendant asserts that the natural inference from Defendant's statements was that Defendant could not go into details because he was being monitored by law enforcement and had exercised his right to remain silent.

(1F). Defendant alleges another instance of improper comment on his right to remain silent occurred at 29.59-32.03 when Defendant placed a call to his civil attorney, Elizabeth Green ("Ms. Green"), in an effort to obtain a criminal attorney. He claims that during the call Ms. Green told him not to talk to anybody and Defendant stated that he was not going to speak to law enforcement and had not told law enforcement anything.

(1G). Defendant also argues that during opening statements, the State made two references to trial evidence that constituted an improper comment on his right to remain silent. He identifies the evidence as the patrol car conversation where Deputy Alleyne stated that Defendant talked about football and his daughters and the recorded conversation with Mr. Saare where Defendant refused to go into details about how his wife died.

(1H). Defendant alleges that during closing arguments, the State asked the jury to infer guilt based on Defendant's failure to explain himself at OCSO. Defendant claims the State directed the jury to the evidence from Defendant's in custody conversation with Mr. Saare and noted that Defendant did not tell Mr. Saare what happened to his wife. He claims that this invited the jury to convict based on what he did not say at OCSO interrogation room.

(1I). Defendant claims that the State also argued during closing argument that the jury should infer his guilt because he did not call or speak to his daughters while he was in custody at OCSO.

(1J). Defendant claims the State argued that the jury should infer guilt based on his in-custody “conversational topics,” including that Defendant discussed football and his daughters. He alleges that the implication is clear that he did not discuss what happened to his wife that night and the State asked the jury “what would you hear if a horrible accident took place,” which implied that his failure to explain was evidence of guilt. He claims that the State’s question was not a reference to the 911 call, because the State tied the question to Defendant’s conversation with Deputy Allenye about football and his daughters.

(1K). Defendant alleges that the State commented on his invocation of his right to counsel during closing arguments. He claims that the State commented on his request to wait to do the gunshot residue test. He alleges that it is clear from the evidence introduced at trial that Defendant preferred to wait until counsel arrived.

(1L). Defendant alleges that the State commented on his failure to take the stand during closing argument when the prosecutor stated “[w]hen you’re asking yourself about the statement, Diane was gonna kill herself, where’s the evidence of that? Where’s there anything from the witness stand or the evidence presented to you to show that?” He claims that the prosecutor was referring to the statement Defendant made on video recordings that Diane was going to kill herself and was a direct comment on Defendant’s failure to take the witness stand.

The Court finds the Defendant presented competent substantial evidence of deficient performance for failing to object or move for mistrial based upon improper evidence and argument on Defendant’s right to remain silent. The Defendant in addition, provided competent substantial evidence that such failure created prejudice. The burden shifts to the State to present contradictory evidence.

A defendant’s pre-*Miranda* silence at the time of arrest and post-*Miranda* silence is protected, and the prohibition on the use of post arrest silence extends to all “evidence and

argument, including impeachment evidence and argument, that [is] fairly susceptible of being interpreted by the jury as a comment on silence.” *State v. Hoggins*, 718 So. 2d 761, 779 (Fla. 1998).¹ All post-arrest silence is protected with or without police interrogation. *Rao v. State*, 52 So. 3d 40, 44-45 (Fla. 4th DCA 2010) (“The prosecutor's comments on the defendant's failure to explain his circumstances to his mother constituted an impermissible comment on silence.”).

Testimony that a defendant stated that he would not provide information is an improper comment on the right to remain silent. *Carlisle v. State*, 164 So. 3d 69, 71 (Fla. 2d DCA 2015) (“Here, Carlisle’s post-arrest, pre-*Miranda* statement that he would not provide any information should not have been admitted because it was fairly susceptible to being interpreted as a comment on Carlisle’s right to remain silent.”). However, if a defendant testifies at trial as to why he or she did not provide exculpatory information to police on direct examination, the State’s questioning on cross-examination is a “mere clarification” of what the defendant already testified to and is not improper, unlike in the instant case. *Diaz v. State*, 958 So. 2d 377, 381-82 (Fla. 3d DCA 2007).

In the instant case, numerous evidence and argument that was fairly susceptible of being interpreted as a comment on Defendant’s right to remain silent was presented to the jury including that Defendant did not explain what happened or discuss his wife’s death with Deputy Allenye, Mr. Saare, Ms. Green, and his daughters, and that Defendant wished to wait before submitting to a gunshot residue test. Trn. Pgs. 1035-37, 1148-49, 1233-35, 2057-58, 2063, 2066, 2071-72, 2587-89, 2650, and 2655.

¹ “Error occurred in this case not only when the prosecutor commented on Hoggins' pre-*Miranda* silence at the time of arrest, but also when the prosecutor made clearly prohibited comments on Hoggins' post-*Miranda* silence in rebuttal closing argument. The prosecutor first emphasized that Hoggins had never, prior to trial, offered the exculpatory explanation he gave at trial. The prosecutor then reiterated that Hoggins did not offer his exculpatory account of events after being advised of his *Miranda* rights.” *Id.* at 772.

At the evidentiary hearing, one of Defendant's trial attorney, Michael Snure ("Mr. Snure"), testified credibly that: he had limited involvement in reviewing the video tape of Defendant at OCSO; that his now deceased trial co-counsel Mr. Kirkconnell was responsible for civilian and law enforcement witnesses at trial and he was responsible for expert witnesses; that during trial Mr. Kirkconnell asked him to make objections during closing arguments although it that task was not initially delegated to him; and that he did not move for mistrial during closing arguments in part because he did not want to alienate the jury. During the trial, before the video interrogation of Defendant was played, Mr. Kirkconnell informed the Court that he had not had a chance to review the latest version of the redacted video and that he was aware that previous versions included comments on Defendant's right to remain silent. Trn. Pg. 1026-28, 2056.

Defendant has demonstrated through competent substantial evidence that counsel allowed numerous evidence and argument that was fairly susceptible of being interpreted as a comment on Defendant's right to remain silent, that counsel's omissions were not the result of reasonable trial strategy, and that there is a reasonable probability of a different outcome absent counsel's errors. The State is unable to contradict this evidence because the state cannot secure the attendance of the necessary witness. The trial counsel who may have been able to illuminate the trial strategy with the lay witnesses and law enforcement predeceased the hearing.² The evidence shows that the State used evidence and argument that Defendant had not adequately explained himself as a reason for the jury to infer his guilt; counsel allowed argument, testimony, and video that was fairly susceptible of being interpreted as a comment on the right to remain silent; and that there was not overwhelming evidence of Defendant's guilt. Trn. Pg. 2568-2678. Defendant has met his burden and is entitled to relief in Ground 1.

² This Court is quite familiar with the excellent reputation of trial counsel. Such reputation is not legally relevant and is an improper consideration. The State is unable to refute the allegations since it cannot secure the witnesses attendance. *Thomas v. State*, 117 So. 3d 1191 (2nd DCA 2013).

Ground Two: Failure to Properly Cross-Examine and Impeach Deputy Alleyne to Establish that Deputy Allenye and not Defendant brought up the Topics of Football and Defendant's Daughters. Defendant alleges that counsel was ineffective for failing to properly cross-examine and impeach Deputy Alleyne to establish that Deputy Allenye, and not Defendant, brought up the topics of football and Defendant's daughters. Defendant claims that the State tried to infer his mental state based on his demeanor and conversational topics, and that Deputy Allenye's unchallenged testimony that Defendant was talking about football and his daughters was a central feature of the State's "demeanor" case. Defendant claims that counsel failed to properly cross-examine or impeach counsel to establish that Deputy Alleyne and not Defendant brought up the "conversational topics." He claims that counsel knew or should have known that Deputy Allenye initiated the conversation and Defendant was simply responding to Deputy Allenye's questions while handcuffed in an inherently coercive environment of a police car.

Defendant alleges that counsel should have known that Deputy Allenye initiated the conversation based on Deputy Allenye's testimony at the December 16, 2010, suppression hearing. He claims that Deputy Allenye testified at the hearing that the conversation started based on Deputy Allenye asking Defendant whether he liked football. Supp. Trn. Pg. 25. He claims that counsel's failure allowed the State to portray him as cold and indifferent to his wife's death and argue therefore, his wife's death was not an accident and that Defendant acted with a depraved mind. Defendant alleges that the State argued during closing argument that Defendant's wife's death was not an accident based on Defendant talking about football. He claims that counsel should have asked whether Deputy Allenye asked Defendant if Defendant liked football, and whether Deputy Allenye started the conversation by asking that question. He alleges absent counsel's errors, there is a reasonable probability of a different outcome.

The Court finds that Defendant has not demonstrated ineffective assistance of counsel within Ground Two. Defendant has not demonstrated that counsel's failure to cross-examine and impeach Deputy Allenye "fell below an objective standard of reasonableness," and that there is a reasonable probability of a different outcome absent counsel's errors. *Strickland*, 466 U.S. at 688 (1984); *Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, in hindsight, but rather whether there was *both* a deficient performance and a reasonable *probability* of a different result."). Consequently, this ground is denied.

Ground Three: Failure to Investigate Demeanor Evidence and Failing to Impeach and Cross-Examine State Witnesses to Establish that Defendant Exhibited Signs of Grief. Defendant alleges that counsel was ineffective for failing to investigate demeanor evidence and impeach and cross-examine State witnesses to establish that Defendant exhibited signs of grief. Defendant claims that the State elicited "demeanor" testimony from Detective Hempfield and Detective Cross that Defendant was calm and that they did not see him crying. Defendant claims that although counsel objected to the testimony, counsel did not use the available video evidence to impeach the witnesses by playing portions of the recorded interview which showed Defendant crying, sniffing, and exhibiting other signs of grief.

Defendant alleges that counsel did not cross-examine the witnesses on their demeanor testimony and did not review the 8 to 12 hours of recorded interrogation video which contained impeachment evidence and numerous instances of Defendant exhibiting the emotional responses that the State claimed he did not have. Defendant claims that if counsel reviewed the video and selected portions of the video that showed Defendant crying, then counsel could have shown the jury that Defendant exhibit grief and also questioned the perception and credibility of the witnesses. Defendant claims that absent counsel's failure, the jury would have been presented

with a more accurate picture of his post-arrest behavior and the State would not be able to argue that his demeanor was not consistent with an accident. Defendant alleges that absent counsel's errors, there is a reasonable probability of a different outcome.

The Court finds that Defendant has not demonstrated ineffective assistance of counsel within Ground Three. Defendant has not demonstrated that counsel's failure to investigate demeanor evidence and impeach and cross-examine witnesses "fell below an objective standard of reasonableness," and that there is a reasonable probability of a different outcome absent counsel's errors. *Strickland*, 466 U.S. at 688 (1984). Consequently, this ground is denied.

Ground Four: Failure to Call Leroy Parker as a Witness. Defendant alleges that counsel was ineffective for failing to call Leroy Parker ("Mr. Parker"), a crime lab analyst supervisor, as a witness because Mr. Parker would have testified that State Attorney Lawson Lamar ("Mr. Lamar") visited the Florida Department of Law Enforcement ("FDLE") lab to motivate forensic analysts to develop incriminating evidence against Defendant. Defendant claims that Mr. Parker was available as a witness and that at deposition, Mr. Parker stated that Mr. Lamar had come to the FDLE lab to "see what we could do with the case" regarding generating a more incriminating gun powder residue test to establish that Defendant's wife was shot from a greater distance.

Defendant asserts that he was prejudiced because the State spent most of its case trying to establish that Defendant's wife was shot from a distance greater than would suggest a suicide through the testimony about a distance determination by Greg Scala. Defendant claims that counsel established that the gunpowder residue pattern experiments took place 7 to 8 months after the incident and that Mr. Lamar and county medical examiner Jan Garavaglia were present which was a rare event; however, counsel was not able to establish that there was a discussion that the initial distance determination of 12 inches was unsatisfactory, which is what Mr. Parker's testimony would have established. Defendant alleges that Mr. Parker's testimony would

have shown that the gunshot residue pattern experiments were conducted at the behest of Mr. Lawson and called into question the eleventh-hour conclusions of the State witnesses that the gun was most likely close to 18 inches away from Defendant's wife when it was fired, rather than the 12 inches they initially concluded.

The Court finds that Defendant has not demonstrated ineffective assistance of counsel within Ground Four. Defendant has not demonstrated that counsel's failure to call Mr. Parker "fell below an objective standard of reasonableness," and that there is a reasonable probability of a different outcome absent counsel's errors. *Id.* At the evidentiary hearing, Mr. Snure testified credibly that the defense team and Defendant all agreed not to call Mr. Parker as a witness because they wished to end their case on a strong note, and also because there were potential issues with Mr. Parker's testimony, which was a reasonable strategic decision. Defendant has not demonstrated deficient performance. Consequently, this ground is denied.

Ground Six: Failure to Object or Move for Mistrial when the State elicited Improper and Prejudicial Testimony and made Improper and Prejudicial Argument. Defendant alleges that counsel was ineffective for failing to object or move for mistrial when the State elicited improper and prejudicial testimony and made improper and prejudicial argument. Defendant claims that counsel never moved for mistrial until the very end of the State's rebuttal closing argument and that he was prejudiced by counsel's failure to make motions for mistrial contemporaneous with the improper testimony and argument that deprived Defendant of meritorious appellate issues. The Court has previously denied Grounds 6B, 6D, 6F, 6G, 6J, 6K, and 6L and adopts and incorporates that Order by reference. *See* Order attached. The Court will now address the remaining claims in Ground Six.

Defendant alleges that the State elicited improper testimony from Dr. Garvaglia and that counsel failed to move for mistrial during Dr. Garavaglia's damaging and impermissible

testimony even over sustained objection. Defendant claims that Dr. Garavaglia testified about aspects of the case for which she had no first-hand knowledge, factual basis, or expertise.

(6A, 6C). Defendant alleges that Dr. Garvaglia's improper testimony was wide-ranging and included her stating that (6A) Defendant's wife's suicide would have been out of the blue and (6C) that Defendant's wife could not have died as a result of a struggle because the person struggling does not want the barrel of a gun pointed at their face. Defendant claims that the Court sustained many of counsel's objections, but counsel did not move for a mistrial.

The Court finds that Defendant has not demonstrated ineffective assistance of counsel within Grounds 6A and 6C. Defendant has not demonstrated that counsel's failure to move for mistrial during Dr. Garavaglia's testimony "fell below an objective standard of reasonableness," and that there is a reasonable probability of a different outcome absent counsel's errors. *Strickland*, 466 U.S. at 688 (1984). At the evidentiary hearing, Mr. Snure testified credibly that Dr. Garavaglia was a hard witness to control, that he believed she appeared foolish and not credible to the jury, that he did not think it was the right time to move for mistrial, and that the way he chose to deal with Dr. Garavaglia was his trial strategy. Defendant has not demonstrated deficient performance. Consequently, these grounds are denied.

Defendant claims the prosecution repeatedly shifted the burden and denigrated the defense during closing arguments. Defendant alleges that counsel should have objected or moved for mistrial in order to preserve his appeal rights by making a contemporaneous objection, but instead waited to move for mistrial until just before the finish of the State's rebuttal closing argument.

(6E). Defendant also claims that the State indirectly accused him of lying during closing arguments by calling his statements "stories" and directing the jury that they had to choose

which story was true. Defendant claims that although the Court sustained counsel's objection that the State's argument shifted the burden of proof, counsel should have moved for mistrial.

(6H). Defendant claims counsel should have objected or moved for mistrial when the State mocked the defense theory that the level of citalopram in Defendant's wife's body was an indication of suicidal tendencies by the State's argument that this issue was not important, and that if the jury believed it was, the State would hand out cups of Kool-Aid. Defendant claims that this argument was akin to telling the jury that if they believed the defense theory, they would be drinking Kool-Aid like the followers of Jim Jones did in committing mass suicide.

(6I). Defendant claims that counsel should have objected when the State belittled the defense experts as "pay-to-say consultants" and that they were part of a "checkbook defense."

The Court finds that Defendant has not demonstrated ineffective assistance of counsel within Grounds 6E, 6H and 6I. Defendant has not demonstrated that counsel's failure to object or move for mistrial during closing arguments "fell below an objective standard of reasonableness," and that there is a reasonable probability of a different outcome absent counsel's errors. *Strickland*, 466 U.S. at 688 (1984). At the evidentiary hearing, Mr. Snure testified credibly that he waited to move for mistrial because he thought one of the prosecutors had discredited himself by screaming and looking foolish, and also because he did not want to alienate the jury in a case he thought he had a chance to win. Defendant has not demonstrated deficient performance or prejudice. Consequently, these grounds are denied.

Ground Seven: Conflict of Interest. Defendant alleges that counsel provided ineffective assistance of counsel because counsel's firm had previously represented prosecutor Robin Wilkinson ("Ms. Wilkinson") in a criminal matter and operated under a conflict of interest without obtaining a waiver. Defendant alleges that Ms. Wilkinson retained Kirkconnell, Lindsey, Snure and Ponall ("KLSP") to represent her in 2003 and this was not disclosed to Defendant

until the summer of 2011 at the earliest, he was not advised to consult with outside counsel, and the Court was not advised. Defendant alleges there is no waiver in open court on the record. Defendant alleges that counsel's prior representation of Ms. Wilkinson appears to have influenced counsel to treat her with kid gloves by failing to review the State's prepared video excerpts, failing to object and move for mistrial due to impermissible evidence and argument, and failing to raise the issue of prosecutorial misconduct. Defendant alleges that under the law he never waived conflict.

The Court finds that Defendant has not demonstrated ineffective assistance of counsel within Ground Seven. Defendant has not successfully demonstrated that he was prejudiced by an actual conflict of interest. *See Hunter v. State*, 817 So. 2d 786, 791-92 (Fla. 2002). At the evidentiary hearing, Mr. Snure testified credibly that Defendant was made aware of the prior representation, and there was no evidence presented that Defendant was prejudiced by the prior representation or that an actual conflict occurred. Defendant has not demonstrated ineffective assistance of counsel. Consequently, this ground is denied.

Ground Eight: Cumulative Error. Defendant alleges that the cumulative effect of counsel's errors prejudiced him. The Court finds that this ground is without merit. Although the Court has found error in Ground 1, the Court does not find error within the remaining grounds. Therefore, this ground is denied.

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

1. Ground 1 of Defendant's Motion for Postconviction Relief is **GRANTED** to the extent that his conviction and sentence on count 1 is **VACATED** and **REVERSED** for a new trial.
2. Grounds 2-8 of Defendant's Motion for Postconviction Relief are **DENIED**.
3. Defendant has **thirty (30) days** from the date of this Order in which to file a notice of appeal.
4. Attached to this order and incorporated by reference is a copy of the September 10,

2015 Order, and portions of the trial transcript.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this ____ day of February, 2016.

JENIFER M. HARRIS
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 **Sean M. Ellsworth, Attorney for Defendant**, Ellsworth Law Firm, P.A., 420 Lincoln Road, Suite 601, Miami Beach, Florida 33139; and to **William Busch, Office of the State Attorney, Postconviction Felony Unit**, 415 North Orange Avenue, Post Office Box 1673, on this ____ day of February, 2016.

Pick Griffin, Judicial Assistant