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APPENDIX A

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

No. 4D21-2860

[Filed: July 28, 2022]

ROBERT S. SCHWARTZBERG, Appellant,	)
v.	)
STATE OF FLORIDA, Appellee.	)

Appeal of order denying rule 3.850 motion from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Daliah Weiss, Judge; L.T. Case No. 502011CF011814AXXXMB.

Andrew B. Greenlee of Andrew B. Greenlee, P.A., Sanford, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Kimberly T. Acuña, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

KLINGENSMITH, C.J., MAY and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

APPENDIX B

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION: S
CASE NO.: 50-2011-CF-011814-AXXX-MB

[Filed: September 15, 2021]

STATE OF FLORIDA,	)
	)
v.	)
	)
ROBERT S. SCHWARTZBERG,	)
Defendant.	)
	)

FINAL ORDER DENYING DEFENDANT'S AMENDED MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court on Defendant's January 17, 2019 "Amended Verified Motion for Post-Conviction Relief" ("Amended Motion") filed pursuant to Florida Rule of Criminal Procedure 3.850. (DE #662). On February 23, 2021, the Court entered an Order granting an evidentiary hearing on Ground 3 and Ground 5 (in part) of the Amended Motion while denying the remaining claims. (DE#718). The Court held an evidentiary hearing on July 26, 2021

where it heard from four witnesses: Captain Anthony Faso, Defendant, Douglas Leifert, Esq., and Robert Gershman, Esq. The Court has reviewed the Amended Motion, the State's October 30, 2019 Response, the court file, and the evidence and arguments presented at the evidentiary hearing and is fully advised in the premises.

Ground 3

In Ground 3, Defendant argues that defense counsel was ineffective for failing to file a motion to suppress the contents of Defendant's notebook. (State Resp., Ex. "S," Notebook Exhibit.) In its previous Order, the Court found that the contents of the notebook were "prepared in anticipation of litigation" and that it memorialized confidential conversations between Defendant and his prospective attorneys; therefore, the contents of the notebook were protected by both work-product privilege and attorney-client privilege. *See Millard Mall Servs., Inc. v. Bolda*, 155 So. 3d 1272, 1274 (Fla. 4th DCA 2015); *Hagans v. Gatorland Kubota, LLC/Sentry Ins.*, 45 So. 3d 73, 77 (Fla. 1st DCA 2010). While trial counsel did attempt to prevent the introduction of the notebook during trial, Defendant argues that counsel would have been successful if they attempted to suppress the notebook based on privilege.

The bulk of the testimony and argument during the evidentiary hearing concerned Ground 3. Defendant testified extensively about his notes and how they memorialized his conversations with prospective defense attorneys. Both of Defendant's trial attorneys, Douglas Leifert and Robert Gershman, testified that the contents of the notebook were consistent with

Defendant's trial testimony and his defense theory. Mr. Gershman specifically stated that he did not move to suppress the notebook because he did not feel that its contents were inclulpatory. Both attorneys acknowledged that the State attempted to use the notebook to imply that Defendant bribed the victim during its cross-examination of Defendant, but both testified that Defendant effectively countered the question by explaining that the notes referred to the State of Florida's victim compensation program. *See generally* Ch. 960, Fla. Stat. (2021).

The Court wholeheartedly agrees with Defendant's postconviction counsel that trial counsel erred in failing to suppress Defendant's notebook—which was clearly protected by privilege. However, while counsel may have rendered deficient performance, the Court still finds that Ground 3 must be denied since Defendant did not suffer the requisite prejudice to prevail on an ineffective assistance of counsel claim. Defendant must demonstrate that, because of counsel's failure to file the motion to suppress, "there is a reasonable probability that . . . the result of the proceeding would have been different," and that confidence in the outcome of the trial was sufficiently undermined. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Zakrzewski v. State*, 866 So. 2d 688, 694–95 (Fla. 2003). *Strickland* is clear that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691; *see also Brewster v. State*, 261 So. 2d 552, 553 (Fla. 2d DCA 1972) ("[rule 3.850] is not concerned with merely alleged 'error' but only where there has

been a clear violation of a constitutional right."). Defendant has the burden to prove that the admission of his notebook's contents had an effect on the jury's determination of guilt, but the Court finds that Defendant does not meet this burden. *See Strickland*, 466 U.S. at 695.

The crux of postconviction counsel's argument is that the State was able to utilize the contents of the notebook against Defendant on cross-examination to attack Defendant's character. (State Resp., Ex. "O," Trial Tr. 721:14–725:25.)[1] While it is "conceivable" that the usage of the notebook had some effect on the proceeding, the Court finds that it is not enough to rise to the level of prejudice. *See Strickland*, 466 U.S. at 693. There was extensive evidence at trial regarding Defendant's character and opinion of the victim. The victim, Corporal Duros, and Deputy Lubinski all testified that Defendant attempted to have sex with the victim, that he expected the victim to have sex with him, that he deserved to have sex with the victim, and that he was angry that the victim declined to have sex

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[1] The State referenced the contents of the notebook at two other points during the trial. First, Corporal Duros identified the notebook and stated that photocopies of the notebook were an accurate representation of the original, but did not testify to its contents. (State Resp., Ex. "P," 385:22–387:23.) The notebook was then admitted during the examination of the victim where she identified some of the names that were listed in the notebook. (State Resp., Ex. "N," 469:13–473:5, 482:11–483:16.) The State did not mention the notebook during its closing arguments. Therefore, the only time the notebook was directly used to attack Defendant's credibility and character was during this brief portion of Defendant's cross-examination.

with him. (State Resp., Exs. "N," "P," Trial Tr. 341–42, 350–57, 447–50, 582–601.)

In addition, Defendant's 911 call was admitted into evidence which allowed the jury to hear Defendant audibly and repeatedly swear at the victim and admit to the operator that the altercation began after the victim refused to have sex with him. (State Resp., Ex. "I," Trial Tr. 606:6–616:13; Ex. "J," 911 Tr.) Even without the notebook, the State presented copious evidence portraying Defendant's character in a negative light in attempt to show that he battered the victim because she refused to have sex with him. The notebook was cumulative of the other evidence presented by the State at trial and had a miniscule effect, if any, on the jury's determination of guilt. *Cf. Abney v. State*, 317 So. 3d 1253, 1254 (Fla. 1st DCA 2021) (noting that cumulative testimony typically has "minimal value" to a jury's verdict); *Coleman v. State*, 718 So. 2d 827, 829 (Fla. 4th DCA 1998) (holding that the failure to present cumulative exculpatory evidence does not prejudice a defendant because there is no reasonable probability it would have affected the outcome of the trial).

In addition to the cumulative nature of the notebook, counsel cannot be considered ineffective when the usage of its contents on cross-examination only occurred because Defendant decided to ignore trial counsel's advice and testify on his own behalf. While a defendant always has the right to testify, defense counsel has the responsibility to inform the defendant about his or her right to testify and the strategic implications of testifying (or not testifying). *Morris v.*

State, 931 So. 2d 821, 833–34 (Fla. 2006) (quoting *United States v. Teague*, 953 F.2d 1525, 1533–34 (11th Cir. 1992)). Nevertheless, it is ultimately the defendant's sole decision whether to testify, even if that decision is contrary to counsel's advice. *Id.* The undisputed testimony at the evidentiary hearing is that trial counsel advised Defendant not to testify at trial because they did not believe Defendant would be an effective witness. Defendant initially agreed with counsel's advice, but ultimately changed his mind at the last moment.

It was certainly Defendant's right to disregard the advice of counsel and testify on his own behalf, but the State's use of the notebook on cross-examination is attributable to a decision that Defendant, not counsel, made. The record is clear that defense counsel did its duty in properly advising Defendant about the risks and benefits of testifying on his own behalf, but that Defendant voluntarily chose to testify anyway. *See Beasley v. State*, 18 So. 3d 473, 495–97 (Fla. 2009). The use of the notebook to attack Defendant on the stand was purely attributable to a decision Defendant made in spite of counsel's proper advice about the risks of testifying. Therefore, Defendant cannot now complain about the potential ill effects of his own decision. *See Flowers v. State*, 149 So. 3d 1206, 1207–08 (Fla. 1st DCA 2014).[2] For the foregoing

[2] Defendant also argues the he was prejudiced because the notebook allowed the State to view his theory of defense prior to trial. While it is true that the notebook revealed that Defendant was considering a self-defense argument at trial, it was obvious from the evidence and the circumstances surrounding the case that

reasons, the Court denies Ground 3 for a lack of prejudice.

Ground 5

Ground 5 of the Amended Motion alleged that trial counsel was ineffective for failing to call two potentially exculpatory witnesses: Anthony Faso and Luigi Rocca. The Court denied the claim as it related to Luigi Rocca but granted an evidentiary hearing on Anthony Faso's alleged testimony. Prior to trial, Captain Faso gave a deposition where he stated: 1) the victim appeared to be calm, 2) Defendant complained about pain to his genitals, and 3) Captain Faso believed the injuries Defendant sustained were defensive in nature. (State Resp., Ex. "T," Faso Deposition.) Defendant argues that this testimony would have supported Defendant's self-defense claim and contradicted the testimony of other witnesses claiming that the victim was hysterical. During the evidentiary hearing, Captain Faso stated that he would have testified consistently with his deposition at trial but that he no longer had an independent recollection of that day. Mr. Gershman testified that he did not call Captain Faso for strategic reasons. He remarked that Captain Faso's testimony about the Defendant's genital pain and defensive wounds would not be helpful because Defendant had refused a medical examination at that time. Mr. Gershman also testified that he was concerned the

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Defendant would argue self-defense. There is also no evidence that the State received an unfair advantage from the notebook's contents. *See Maharaj v. State*, 778 So. 2d 944, 941 (Fla. 2000) ("[p]ostconviction relief cannot be based on speculation or possibility.").

defense's credibility would be harmed by calling a witness whose testimony was meaningfully contradicted by the majority of the witnesses.

While the decision to call a witness is generally left to the sound discretion of trial counsel, an evidentiary hearing is usually still required to resolve the claim. *Ford v. State*, 825 So. 2d 358, 360–61 (Fla. 2002). If defense counsel investigates the witness prior to trial, the decision of whether to call that witness is "virtually unchallengeable" and can only be attacked if the defendant demonstrates that "no competent counsel" would have made the same decision. *Mendoza v. State*, 81 So. 3d 579, 581 (Fla. 3d DCA 2012) (quoting *Strickland*, 466 U.S. at 690). After holding an evidentiary hearing on the matter, the Court finds that Mr. Gershman explained his reasoning for not calling Captain Faso to testify at trial, that his reasons were based on a valid strategic decision, and that Defendant has failed to overcome the presumption of reasonableness the Court must attribute to Mr. Gershman's decision. *See Ferguson v. State*, 101 So. 3d 895, 987–98 (Fla. 4th DCA 2012). Ground 5 is denied as legally insufficient.

Accordingly, it is hereby

ORDERED that the Court adopts and incorporates into this Order the exhibits attached to the State's October 30, 2019 Response (DE #698–700) and its previous Order dated February 23, 2021. (DE #718). It is further

ORDERED that Ground 3 and Ground 5 of Defendant's January 17, 2019 "Amended Verified

Motion for Post-Conviction Relief" (DE #662) are **DENIED**. Defendant has the right to appeal this Order within **thirty (30) days** of its rendition.

DONE AND ORDERED, in Chambers, at West Palm Beach, Palm Beach County, Florida.

/s/ Daliah H. Weiss
DALIAH WEISS
CIRCUIT JUDGE

COPIES TO:

Name	Address	Email
ANDREW B. GREENLEE	401 East 1st Street, Unit 261 Sanford, FL 32772	Andrew@andrewgreenleelaw.com; andrewbgreenlee@gmail.com
LAURA J. FISHER		lfisher@sa15.org; e-postconviction@sa15.org

APPENDIX C

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION: S
CASE NO.: 50-2011-CF-011814-AXXX-MB

[Filed: February 23, 2021]

STATE OF FLORIDA,	)
	)
v.	)
	)
ROBERT S. SCHWARTZBERG,	)
Defendant.	)
	)

ORDER DENYING IN PART AND GRANTING EVIDENTIARY HEARING ON DEFENDANT'S AMENDED MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court on Defendant Robert S. Schwartzberg's "Amended Verified Motion for Post-Conviction Relief" ("Amended Motion") filed on January 17, 2019 (DE #662) pursuant to Florida Rule of Criminal Procedure 3.850. The State filed its Response to the Amended Motion on October 30, 2019. (DE #698-700). The Defendant filed a Reply to the State's Response on January 14, 2020. (DE #701). The

Court has carefully considered the Amended Motion, the State's Response, the Reply, and the court file and is otherwise fully advised in the premises.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by Second Amended Information with three counts: Sexual Battery (No Physical Force) (Count 1), False Imprisonment (Count 2), and Domestic Battery by Strangulation (Count 3). (State Resp., Ex. "A," Second Amended Information.) The case proceeded to trial where, on March 5, 2015, a jury found Defendant guilty of Battery, a lesser-included offense as to Count 1, guilty as charged in the Information as to Count 2, and guilty of Battery, a lesser-included offense, as to Count 3. (State Resp., Ex. "B," Verdict.) Defendant was adjudicated guilty and sentenced to four (4) years imprisonment, with credit for 79 days for time served, followed by one year of community control on Count 2 and one year of community control for Counts 1 and 3 to be served concurrently with community control on Count 2. (State Resp., Exs. "C," "D," Sentences and Sentencing Tr.)

Defendant appealed his conviction and sentences to the Fourth District Court of Appeal. The district court affirmed Defendant's conviction, but reversed and remanded the case back to the trial court for resentencing; the district court's mandate issued on April 21, 2017. (State Resp., Ex. "E," Opinion and Mandate); *Schwartzberg v. State*, 215 So. 3d 611 (Fla. 4th DCA 2017). At resentencing, the court sentenced Defendant to thirty (30) months imprisonment on Count 2, with credit for 914 days time served, followed

by two (2) years of probation as well as one year of probation on both Counts 1 and 3 to be served consecutive to one another. (State Resp., Ex. "F," Sentences and Agreed Order.) Defendant filed a motion for postconviction relief pursuant to rule 3.850 on July 16, 2018, but the court granted Defendant leave to amend the motion to comport with the oath and certification requirements of rule 3.850. Defendant's Amended Motion was filed on January 17, 2019.

LEGAL ANALYSIS AND RULING

The Amended Motion alleges seven grounds for relief based on ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A successful ineffective assistance of counsel claim must meet two criteria. First, the defendant must show that his attorney made errors "so serious" that counsel's performance fell below the threshold of "reasonably effective assistance." *Id.* at 687. There is no "checklist" defense counsel must follow to be considered reasonably effective, and courts must be highly deferential by presuming that counsel's conduct was reasonable. *Id.* at 688-89. An attorney's actions will only be considered deficient if, in light of the context and circumstances at the time, counsel's "acts and omissions were outside the wide range of professionally competent assistance." *Id.* at 689-90; *see also Morton v. State*, 995 So. 2d 233, 244 (Fla. 2008). Even if the defendant can demonstrate that counsel made such an error, he or she must also demonstrate that the error is "prejudicial," or, in other words, the error is great enough that there is a "reasonable probability" that, but for counsel's errors, the result of the proceeding

would have been different. *Mendoza v. State*, 87 So. 3d 644, 652 (Fla. 2011).

Defendant alleges the following seven grounds for relief: 1) defense counsel was ineffective for stipulating to an erroneous jury instruction, which effectively deprived Defendant of his theory of defense; 2) defense counsel was ineffective for failing to correct the State's mischaracterization of a 911 call; 3) defense counsel was ineffective for failing to file a motion to suppress certain privileged materials; 4) defense counsel was ineffective for failing to impeach and effectively cross-examine several key State witnesses; 5) defense counsel was ineffective for failing to call exculpatory witnesses; 6) defense counsel was ineffective for failing to request a *Richardson*[1] hearing; and 7) defense counsel was ineffective for failing to request lesser-included offenses to the false imprisonment charge (Count 2). The Court will address each of Defendant's claims individually.

A. Ground 1-Stipulating to Erroneous Jury Instruction

Defendant's Ground 1 argues that defense counsel erred by stipulating to an erroneous jury instruction regarding the justifiable use of non-deadly force for a self-defense case. Although the instruction was a standard jury instruction, multiple district courts had found that instruction to be erroneous prior to Defendant's trial, as it contained an additional comma which inadvertently changed the meaning of the

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[1] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

instruction to no longer reflect the self-defense statute. *Talley v. State*, 106 So. 3d 1015, 1017 (Fla. 2d DCA 2013). *See also Sims v. State*, 140 So. 3d 1000, 1004-05 & n. 7 (Fla. 1st DCA 2014); *Neal v. State*, 169 So. 3d 158, 161-62 (Fla. 4th DCA 2015). The State seemingly concedes the instruction was erroneous, but argues that the claim is procedurally barred as it was raised on direct appeal. In the alternative, the State also argues the Defendant suffered no prejudice as a result of the instruction because no fundamental error occurred.

The Court agrees with the State's alternative argument and finds that Defendant did not suffer prejudice due to the jury instruction.[2] When an appellate court specifically finds that there was no fundamental error regarding a certain issue, the defendant cannot later show prejudice in a postconviction motion under the *Strickland* standard. *See Lowe v. State*, 2 So. 3d 21, 38 (Fla. 2008). Although the Fourth District rejected Defendant's arguments regarding fundamental error, the district court did not

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[2] As to the State's argument that Defendant's claim is procedurally barred because it was previously raised on direct appeal, Defendant did argue that it was fundamental error for the jury instruction to be given. (State Resp., Ex. "H, Initial Brief 25-29.) The district court found this argument, among several others, to be "without merit." *Schwartzberg*, 215 So. 3d at 616. However, claims of fundamental error and those of ineffective assistance of counsel are not the same, so if an appellate court rejects a fundamental error argument it does not necessarily preclude the defendant from the raising a similar argument based on ineffective assistance of counsel in a subsequent postconviction motion. *Clarke v. State*, 102 So. 3d 763, 765 (Fla. 4th DCA 2012) (quoting *Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001)).

explicitly state that its rejection was based on a lack of fundamental error. *Schwartzberg*, 215 So. 3d at 616. *Cf. Clarke v. State*, 102 So. 3d 763, 765 (Fla. 4th DCA 2012) (holding that a claim raised on direct appeal is not procedurally barred in a rule 3.850 motion if the appellate court did not conclusively opine on the issue).

Nevertheless, the Court finds the instant case to be analogous to the *Sims* and *Neal* cases which found that no fundamental error occurred even though the same erroneous self-defense instruction was given. In *Sims*, the First District found that giving the instruction did not result in fundamental error for four reasons: 1) defendant was not engaged in an unlawful activity at the time, 2) the State did not rely on the jury instruction in its closing, 3) defendant agreed to the instruction, and 4) the defendant's claim of self-defense was inconsistent with the other evidence presented at trial. *See Sims*, 140 So. 3d at 1005-06. In *Neal*, the Fourth District adopted the reasoning of the *Sims* court and held that fundamental error did not occur when two of those four factors were met: the State did not rely on the jury instructions at closing and Defendant ultimately agreed to the instructions. *See Neal*, 169 So. 3d at 164. These same two factors relied upon in *Neal* are present in this case. (State Resp., Ex. "L," Trial Tr. 791-803, 822-34.) The State also made this same argument on appeal where they ultimately prevailed. (State Resp., Ex. "H," Answer Brief 17-21.) Since giving the jury instruction was not fundamental

error, Defendant cannot show prejudice.[3] For this reason, Ground 1 is denied.

B. Ground 2-Failure to Correct State's Mischaracterization of 911 Call

In Ground 2 of the Amended Motion, Defendant argues that counsel was ineffective for allowing the State to "blatantly misrepresent the contents" of a 911 call which allowed the State to successfully argue that Defendant had committed false imprisonment. Defendant also contends that counsel further compounded that error by failing to provide a transcript or enhanced version of the 911 call so that the jury could see Defendant's statements in the appropriate context. The Court has reviewed the transcript of the 911 call played at the trial, the transcript of the 911 call provided by Defendant, and the closing argument where the State attempted to contextualize the 911 call. (State Resp., Exs. "I," "J," "L," Defendant's 911 Transcript, Trial Tr. 606-16, 828-34.) After reviewing this record, the Court adopts the totality of the State's Response as to Ground 2 and finds that the State did not mischaracterize the

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[3] Defendant relies on *Washington v. State*, 113 So. 3d 1028, 1031 (Fla. 5th DCA 2013) to argue that the prejudice prong is satisfied since the error involved the instruction that advanced Defendant's only theory of defense. The Court finds this argument unpersuasive for two reasons. First, for the reasons stated above, the error was no so great as to "negate" the entirety of a self-defense argument. Second, as Defendant seems to acknowledge in the instant motion, part of his defense was also to attack the credibility of the victim. (Amended Motion at 27); (State Resp., Ex. "L," Trial Tr. 803-22.)

contents of the 911 call. The trial court must allow a party wide latitude in making their closing arguments so long as it advances legitimate arguments and makes logical inferences from the evidence presented. *See McArthur v. State*, 801 So. 2d 1037, 1040 (Fla. 5th DCA 2001). The Court finds that the State's argument falls into these wide bounds and that counsel cannot be ineffective for failing to object to a proper argument. *See Rogers v. State*, 957 So. 2d 538, 549 (Fla. 2007). For this reason, Ground 2 is denied as legally insufficient.

C. Ground 3-Failure to File Motion to Suppress

Ground 3 of Defendant's Amended Motion asserts that defense counsel was ineffective for failing to file a motion to suppress the contents of Defendant's notebook on the grounds that the notebook was protected under both attorney-client and work-product privilege. In order to successfully allege ineffective assistance of counsel based upon the failure to file a motion to suppress, the defendant must demonstrate that, had the motion to suppress been filed, it would have been successful. *See Zakrzewski v. State*, 866 So. 2d 688, 694 (Fla. 2003). The State advances three arguments to refute this claim. First, the State claims that defense counsel did seek to suppress the contents of the notebook, but that the trial court overruled the objection. Second, the State argues that the notebook's content were not privileged. Finally, the State maintains that Defendant suffered no prejudice as a result of the notebook being admitted.

Given the contents of Defendant's notebook, the Court finds that at least some of the notebook could

have been suppressed because its contents were privileged work product. Defendant's notebook contains a variety of notes regarding defense counsel, prospective defenses, and potential witnesses. (State Resp., Ex. "S," Notebook Exhibit.) It is clear, and not disputed, that these notes were "prepared in anticipation of litigation," and are thus protected by work product privilege.[4] *See Millard Mall Servs., Inc. v. Bolda*, 155 So. 3d 1272, 1274 (Fla. 4th DCA 2015).

Attorney-client privilege also applies. As a rule, communications between an attorney and his or her client "with the purpose of obtaining legal services" are confidential subject to certain statutory exceptions. § 90.502, Fla. Stat. (2019); *Dean v. Dean*, 607 So. 2d 494, 495-96 (Fla. 4th DCA 1992). While the contents of the notebook are not necessarily a communication between the two, it memorializes and summarizes a conversation that would undoubtedly have been protected by attorney-client privilege; therefore, the notes themselves are privileged. *Cf. Hagans v. Gatorland Kubota, LLC/Sentry Ins.*, 45 So. 3d 73, 77 (Fla. 1st DCA 2010) (holding that intake documents prepared by attorney which memorialized the client's communications made for the purpose of obtaining legal services was privileged); *see also Canarelli v. Eighth Judicial Dist. Ct. in and for Cty. of Clark*, 464 P.3d 114, 119-20 (Nev. 2020) (holding that notes

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[4] Although the State argues that this privilege cannot apply because Defendant is not an attorney, work product privilege applies to any product prepared in anticipation of litigation by both attorneys and parties. *See Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384 (Fla. 1994).

written by a party memorializing a conversation with his lawyers was protected by attorney-client privilege).

Conversely, the State's arguments regarding Ground 3 are unavailing. As to the State's first defense, the Court finds that, although defense counsel did object to the introduction of the notebook's contents, his objections were unrelated to a privilege argument. (State Resp., Exs. "N," "P," Trial Tr. 370-85, 470-81.) Second, as stated above, the portions of Defendant's notebook related to preparing for the instant case and memorializing conversations between him and his attorney are privileged. Finally, Defendant has demonstrated potential prejudice that will require additional fact-finding in an evidentiary hearing. The Court does agree with the State that much of the evidence in the notebook is cumulative, and cumulative evidence cannot serve as the basis of an ineffective assistance of counsel claim. *See Coleman v. State*, 718 So. 2d 827, 829 (Fla. 4th DCA 1998). However, Defendant successfully alleges that certain contents in the notebook may have had a prejudicial effect on the jury. In particular, Defendant notes that the State used content in the notebook on cross-examination that indicated Defendant may have been stalking or tampering with the victim. (State Resp., Ex. "O," Trial Tr. 721-25.) Because the record is not fully conclusive, the Court will schedule an evidentiary hearing on Ground 3 to determine the scope of the privileged information in the notebook and whether or not prejudice occurred due to the information that was admitted into evidence.

D. Ground 4-Failure to Impeach/Cross-Examine Key State Witnesses

Ground 4 of Defendant's Amended Motion argues that defense counsel was ineffective for failing to impeach the victim, Deputy Lubinski, and Deputy Duros with apparent inconsistencies in their testimony. The State argues that defense counsel is not required to make every possible argument or attack every inconsistency, and that defense counsel engaged in an objectively reasonable cross-examination of the witnesses. The Court agrees with the State and adopts the State's Response as to Ground 4. While it is perhaps conceivable that defense counsel could have further impeached the witnesses in the way that Defendant suggested, these matters did not undermine the State's argument and there is not a reasonable probability the results of the trial would have been different had defense counsel impeached the witnesses further. *See Deparvine v. State*, 146 So. 3d 1071, 1094 (Fla. 2014); *Kegler v. State*, 712 So. 2d 1167, 1168 (Fla. 2d DCA 1998). Ground 4 is denied.

E. Ground 5-Failure to Call Exculpatory Witnesses

Defendant claims in Ground 5 that defense counsel was ineffective for failing to call two witnesses, Lieutenant Faso and Luigi Rocca, who would have provided exculpatory testimony. In order to successfully raise an ineffective assistance of counsel claim based on the failure to call a witness, Defendant must allege 1) the identity of the witness, 2) the substance of the witness' testimony, 3) how the omission of such evidence prejudiced Defendant, and

4) that the witness was available to testify at trial. *Nelson v. State*, 875 So. 2d 579, 582-83 (Fla. 2004). The State argues that Defendant has not alleged how he was prejudiced by the lack of testimony from Lieutenant Anthony Faso and Luigi Rocca.

The Court finds that, based upon the testimony of Lieutenant Faso that was given in his deposition, Defendant has alleged all four prongs of *Nelson* and is entitled to an evidentiary hearing on why defense counsel did not call Lieutenant Faso. (State Resp., Ex. "T," Deposition.) However, the Court also finds that Defendant has not alleged sufficient prejudice to receive an evidentiary hearing in regards to Luigi Rocca. The Court adopts the reasoning of the State Response in denying the Ground 5 insofar as it relates to Luigi Rocca. In sum, the Court grants-in-part and denies-in-part Ground 5 of the Amended Motion. An evidentiary hearing shall be held on the failure to call Lieutenant Faso but not on the failure to call Luigi Rocca.

F. Ground 6-Failure to Request *Richardson* Hearing

Ground 6 argues that defense counsel was ineffective for failing to request a *Richardson* hearing based upon the testimony of Deputy Lubinski, who apparently stated that he had taken "verbatim" notes of statements made by Defendant. Defendant argues that the State's failure to provide him with these notes was a discovery violation that should have been brought to the trial court's attention. The State argues that Defendant misconstrues the testimony of Deputy

Lubinski and that there was no evidence a discovery violation occurred.

A *Richardson* hearing must occur when the court is made aware of circumstances that indicate the State may have violated discovery rules in order to ensure that the defendant is not prejudiced by these alleged violations. *Smith v. State*, 7 So. 3d 473, 505 (Fla. 2009). A defendant may raise an ineffective assistance of counsel claim if his trial counsel fails to request a *Richardson* hearing in the face of a possible discovery violation. *See Thompson v. State*, 796 So. 2d 511, 520 (Fla. 2001); *Collins v. State*, 671 So. 2d 827, 828 (Fla. 2d DCA 1996).

Defendant argues that the State failed to comply with Florida Rule of Criminal Procedure 3.220(b)(1) when it failed to provide the "verbatim" notes of Deputy Lubinski. Rule 3.220 requires that the State provide a defendant with "police and investigate reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled," as well as "any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries." Fla. R. Crim. P. 3.220(b)(1)(B)-(C) (amended by *In re Amendment to Florida Rule of Criminal Procedure 3.220 (Discovery)*, 550 So. 2d 1097 (Fla. 1989)). Likewise, the Florida Supreme Court had held that, prior to the amendment of rule 3.220, a defendant is entitled police reports if "the reports contained substantially verbatim recital of [a defendant's] statements recorded contemporaneously

by an officer or agent of the state." *Downing v. State*, 536 So. 2d 189, 190-91 (Fla. 1988) (citing *Lockhart v. State*, 384 So. 2d 289, 290 (Fla. 4th DCA 1980)). Here, Defendant concedes that he received a supplemental report that was based upon the purportedly "verbatim" notes Deputy Lubinski took, but argues that the notes should have been provided as well.

The Court finds that Ground 6 does not state a legally cognizable ground for relief for two reasons. First, Deputy Lubinski's testimony was that the "verbatim" statements of Defendant were included in the supplemental report, as evidenced by the fact that he refreshed his recollection with the report at trial to relay specific statements attributed to Defendant. (State Resp., Ex. "Q," Trial Tr. 586, 591-92.) Defense counsel also confirmed during direct examination that he had a copy of the report from which Deputy Lubinski was reading these verbatim statements. *Id.* at 585:11-17. Defendant's argument that the initial notes of Deputy Lubinski somehow contained more discoverable information than what was in the supplemental report is an impermissibly speculative claim. *See Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). Second, even assuming that these notes did contain additional verbatim statements, Defendant does not demonstrate that he is legally entitled to them. While Defendant seems to argue that he is entitled to any document which contains a statement made by him, the plain language of rule 3.220 seemingly exempts notes that are used to compile police reports. *See* Fla. R. Crim. P. 3.220(b)(1)(B). This reading of Rule 3.220 is supported by other case law which has held that the notes of public officials are not

discoverable public records. *Cf. Braddy v. State*, 219 So. 3d 803, 820 (Fla. 2017) (finding that the notes of a state attorney were not "public records" within the meaning of chapter 119, Florida Statutes and were thereby not discoverable under rule 3.852). For these reasons, the Court denies Ground 6.

G. Ground 7-Failure to Request Lesser-Included Offenses

Defendant's final claim, Ground 7, asserts that defense counsel was ineffective for failing to request lesser-included offenses as to Defendant's false imprisonment count. Although Defendant concedes that the Florida Supreme Court has held that the failure to request an instruction for a lesser-included offense is not cognizable as an ineffective assistance of counsel claim, he argues that the instant case is distinguishable for the reasons argued by Defendant in Ground 2 of the Amended Motion. *See Sanders v. State*, 946 So. 2d 953, 959-60 (Fla. 2006). The Fourth District Court of Appeal recently held that a defendant may have a sufficient claim if lesser-included offenses if providing those offenses was supported by the evidence. *See Hargrett v. State*, 254 So. 3d 982, 983-84 (Fla. 4th DCA 2018). *Hargrett* does not apply to the instant case, as Defendant's argument for the addition of lesser-included offenses is based on the pardon power of the jury, as he concedes that the jury found sufficient evidence to find Defendant guilty of false imprisonment (though he disputes the characterization of that evidence). The Court finds that it is bound by the *Sanders* decision, and thus it must deny Ground 7 of Defendant's Amended Motion.

Accordingly, it is hereby

ORDERED that the Court adopts and incorporates into this Order the exhibits attached to the State's October 30, 2019 Response (DE#698-700). It is further

ORDERED that the Court **GRANTS** an evidentiary hearing on Ground 3 and Ground 5 as it relates to the testimony of Lieutenant Faso. The date and time of this hearing will be set by a separate order of the Court. It is further

ORDERED that Defendant's "Amended Verified Motion for Post-Conviction Relief" filed on January 17, 2019 (DE#662) is **DENIED in PART** as to Grounds 1, 2, 4, 5 (regarding the testimony of Luigi Rocca), 6, and 7. It is further

ORDERED that this Order is a non-final, non-appealable order. Defendant may not appeal until after the Court fully disposes of Grounds 3 and 5 and a final order is entered.

DONE AND ORDERED, in Chambers at West Palm Beach, Palm Beach County, Florida.

[STAMP]

502011CF011814AXXXMB 02/24/2021
Daliah H. Weiss
Circuit Judge

COPIES TO:

Name	Address	Email
ANDREW B. GREENLEE	401 East 1st Street, Unit 261 Sanford, FL 32772	Andrew@andrewgreenleelaw.com; andrewbgreenlee@gmail.com
LAURA J. FISHER		lfisher@sa15.org; e-postconviction@sa15.org

APPENDIX D

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

CASE NO.: 4D21-2860
L.T. No.: 502011CF011814AXXXMB

[Filed: October 03, 2022]

ROBERT S. SCHWARTZBERG Appellant / Petitioner(s)	)
v.	)
STATE OF FLORIDA Appellee / Respondent(s)	)

BY ORDER OF THE COURT:

ORDERED that appellant's August 23, 2022 motion for rehearing en banc is denied.

Served:

cc:	Attorney General-W.P.B.	Andrew B. Greenlee	Kimberly T. Acuña

kr

/s/ Lonn Weissblum
LONN WEISSBLUM, Clerk [SEAL]
Fourth District Court of Appeal

APPENDIX E

15th JUDICIAL CIRCUIT
PALM BEACH COUNTY, FLORIDA
CIRCUIT CRIMINAL COURT

[Filed: May 4, 2015]

NOTEBOOK EXHIBIT

CASE No. 2011-CF-011814

Defendant: Robert Schwartzberg

Item: 3 pages from notebook

Filed by the: **STATE** **DEFENSE** **COURT**

FOR IDENTIFICATION, as Exhibit # 5A-C **this date** 3/3/2015

ADMITTED INTO EVIDENCE as EXH. # 5A-C **this date** 5/04/15
Sharon R. Bock, Clerk & Comptroller

BY: /s/ [Illegible]**, D.C.**

St/Df Exhibit #_____ released per Court Order of _____, 2____, this_____day of _____, 2____.

SIGNED: _____

WITNESS: _____**D.C.**

App. 32

Handwritten Exhibit From Notebook

[*See Fold-Out Exhibit*]

Judge: Charles Burton Prosecutor 772-215-1443

after all

1) Lack of evidence (no witness)
2) Self Defense (evidence (my injuries) (slot)
3) Lack of injuries (inconsistent) w/ her being beaten

My [redacted] made false allegations against me. I was arrested for their. I was not guilty for these charges in eagerly anticipating a trial, I am confident I will exonerated.

Thank you for your time!!

Marc Shiner

Offer her cash incentives to prosecute cases

copy of police report
- any documents
- statement from you on what happened.

1:30 11/7

Hire Private Council

Attn Suzette

LAW Office of JANPETERWeiss@gmail.com

7810 S DIXIE HWY

3rd floor

561-822-1900

w/in Dixie/Hwys across

White boxie building

Resume

people who would give + reference Character

10:26 left

Vince* hagera2@gmail.com

(Dave/Carlos) Boenzzi Manager (561)366-9753

she just deleted me on facebook on 11/8/2011 the day I got the restraining order

Find what time 911 call was made

Ex bfs Will Chandler - Greenville South Carolina

Chris J Armin, Miklus Kultsor, Emanuel Mack

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