[Cite as *State v. Miller,* 2018-Ohio-5127.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TSHOMBE MILLER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0120

Application to Reopen

BEFORE:
Carol Ann Robb, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:
Denied.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Tshombe Miller, pro se, Inmate Number A701488, Mansfield Correctional Institution, P.O. Box 788, Mansfield, Ohio 44901address, for Defendant-Appellant.

Dated: November 30, 2018

PER CURIAM.

{¶1} Defendant-Appellant Tshombe Miller has filed an application to reopen his appeal under App.R. 26(B). He proposes five assignments of error, claiming appellate counsel was ineffective by failing to raise arguments on: notice as to a medical diagnosis, failure to investigate a defense, failure to challenge various jurors, prosecutorial misconduct in closing arguments, and failure to call a witness. For the following reasons, reopening is denied.

Statement of the Case

{¶2} A jury convicted Appellant of raping his two daughters multiple times before and after they turned 13 years of age and committing gross sexual imposition against one of them when she was 10 years old. Appellant was represented at trial by an experienced criminal defense attorney who filed a timely notice of appeal from the August 8, 2017 sentencing entry. A different experienced appellate attorney was appointed to represent Appellant in the direct appeal, where the following two assignments of error were raised:

"Appellant was denied due process of law pursuant to both the United States and Ohio constitutions, had his right to protection against double jeopardy violated and was further deprived his rights pursuant to Article I, Section 10 of the Ohio Constitution as the State failed to distinguish the alleged crimes through indictment, bill of particulars and/or at trial."

"Appellant was denied due process of law pursuant to both the United States Constitution and Ohio Constitution as there is no way to know that the jurors who convicted him reached a unanimous verdict as to each and every act because the acts in this case were not delineated."

{¶3} On August 21, 2018, this court overruled these assignments of error and affirmed Appellant's convictions in *State v. Miller*, 7th Dist. No. 17 MA 0120, 2018-Ohio-3430. Appellant filed a timely application to reopen under App.R. 26(B) on October 15, 2018.

Standard for Reopening

{¶4} A criminal defendant may apply for reopening of an appeal from the judgment of conviction and sentence based on a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1). The application for reopening must contain: "One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). The application must demonstrate there is a "genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). The inquiry utilizes the standard two-part test for ineffective assistance of counsel where both prongs must be met: deficient performance and resulting prejudice. *See State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 5, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); App.R. 26(B)(2)(d). *See also State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (if the performance was not deficient, then there is no need to review for prejudice and vice versa).

{¶5} In evaluating an alleged deficiency in performance, our review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142–143, 538 N.E.2d 373 (1989), citing *Strickland*, 466 U.S. at 689. *See also State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995) (a court should not second-guess the strategic decisions of counsel). Instances of debatable strategy very rarely constitute ineffective assistance of counsel, and there are "countless ways to provide effective assistance in any given case." *State v. Thompson*, 33 Ohio St.3d at 10; *Bradley*, 42 Ohio St.3d at 142, citing *Strickland*, 466 U.S. at 689. Counsel has wide discretion to choose the errors to be assigned on appeal and focus on what is viewed as the strongest. *See Tenace*, 109 Ohio St.3d 451 at ¶ 7. *See also Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal" as attempting to address too many issues can result in a dilution of the force of the stronger arguments).

{¶6} On the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *Carter*, 72 Ohio St.3d at 558. Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d 136 at fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

Proposed Assignments of Error One & Five: Medical Diagnosis

{¶7} Appellant proposes five assignments of error that he believes should have been raised by appellate counsel. First, he alleges:

"Appellant was denied due process of law under the Sixth and [F]ourteenth Amendments of the United States Constitution and Article I Section 10 of the Ohio Constitution as the State failed to provide Appellant with accusations through Indictment, Discovery, Bill of particulars, and/or Notice of intent to use evidence."

{¶8} This argument is centered on the evidence presented at trial that the children tested positive for the same sexually transmitted disease (STD). As Appellant was not charged with an offense containing an element involving the causing of an STD, there was no reason why the indictment would contain such information. *See* Crim.R. 7(B) (the indictment shall contain a statement that the defendant has committed a public offense specified in the indictment sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged; "The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved.").

{¶9} Likewise, there is no requirement that a rape victim's STD test results be announced in a bill of particulars. The purpose of a bill of particulars is to inform an accused of the nature of the offense and the conduct alleged to constitute the offense. Crim.R. 7(E). "A bill of particulars has a limited purpose—to elucidate or particularize the conduct of the accused alleged to constitute the charged offense." *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985). Additionally, as noted in the direct

appeal, open-file discovery was utilized in this case. *Miller*, 7th Dist. No. 17 MA 0120 at ¶ 17.

{¶10} As for the information provided in discovery, Appellant seems to equate voir dire with discovery as he cites to a statement during jury selection as revealing that only limited information was provided in discovery; the state noted in voir dire that there would be medical testimony as to physical examinations of the victims. (Tr. 88). This statement made during jury selection does not refer to what was provided in discovery. At trial, the nurse practitioner testified that the children tested positive for the same sexually transmitted disease (STD). (The activity log of Children Services and the nurse practitioner reports, which both contained this information, were identified as exhibits but later withdrawn as unnecessary.) There was no objection by counsel as to an issue with notice of the children's diagnoses. In fact, the state filed a notice of intent to use evidence on November 18, 2016, referring to items such as case notes from Children Services and reports from the nurse practitioner. And, the medical records of the children and activity log of Children Services were previously received by defense counsel in discovery as evidenced by a signed receipt on September 12, 2016, wherein he also acknowledged receiving notice of the state's intent to use this evidence. We also note the parties entered a stipulated protective order as to various documents relating to the children on March 8, 2017, and a motion filed by the state on March 15, 2017 pointed out that both victims tested positive for sexually transmitted diseases.

{¶11} Contrary to Appellant's argument in reopening, there was notice of the children's medical condition provided in discovery. There is no indication of ineffective assistance of trial counsel for failing to present an objection as to notice of the STD diagnosis of each child and no indication of ineffective assistance of appellate counsel for failing to raise the issue on appeal.

{¶12} On a related issue, Appellant's fifth proposed assignment of error contends:

"Appellant was denied effective assistance of counsel guaranteed under the Sixth Amendment of the United States Constitution when trial counsel failed to investigate [a] defense for the appellant."

{¶13} Appellant seems to suggest the state failed to notify him that he had an STD. He points to the prosecutor's closing argument which reiterated that both children tested positive for the same STD; the prosecutor then noted they both had sex with their father. (Tr. 605). The state did not present evidence on Appellant's medical records. To the extent Appellant interprets the prosecutor's closing argument to mean Appellant had been diagnosed with an STD, we note there is no indication the state was alluding to information obtained from Appellant's medical records or a diagnosis rendered as to him. This was simply the state's recap of the children's medical information presented at trial and of their testimony that they both engaged in sexual conduct with their father (and with each other at his orders).

{¶14} The state's March 15, 2017 motion asked the court to order the Mahoning County jail to release Appellant's medical records so the state could determine whether Appellant was diagnosed with or treated for an STD while in jail. In granting the state's motion and ordering the jail to release Appellant's medical records, the court ordered the state to provide copies to defense counsel. On March 30, 2017, defense counsel acknowledged the state's notice of intent to use evidence and signed the receipt for the supplemental discovery of Appellant's medical jail records. As aforementioned, the state did not then present evidence of Appellant's medical condition at trial.

{¶15} Appellant concludes that trial counsel failed to investigate his medical record for a defense. However, there is no indication defense counsel failed to review the records after receiving them, and what Appellant's jail records showed about an STD is not in the record. Whether a convincing defense theory could have been presented from these records would entail mere speculation; speculation that Appellant does not even voice. Appellant has not presented a genuine issue on ineffective assistance of appellate counsel as to the medical records.

Proposed Assignment of Error Two: Failure to Challenge Jurors

{¶16} Appellant's second proposed assignment of error argues:

"Appellant was denied the right to effective assistance of counsel as guaranteed under the Sixth Amendment of the United States Constitution when trial counsel failed to challenge for cause or use peremptory challenge to excuse jurors from sitting on the jury."

{¶17} Crim.R. 24(C) provides the reasons for challenging a juror for cause. For instance, a juror may be challenged for cause if the juror is possessed of a state of mind evincing enmity or bias toward a party. Crim.R. 24(C)(9). After listing some other reasons, including certain relationships not applicable here, the rule concludes by adding the reason "[t]hat the juror is otherwise unsuitable for any other cause to serve as a juror." Crim.R. 24(C)(14). Pursuant to Crim.R. 24(D), a felony defendant in a non-capital case can exercise four peremptory challenges.

{¶18} Appellant complains three jurors answered that they knew attorneys who worked in the prosecutor's office. Upon questioning, these jurors did not indicate they knew the attorneys well, and none of them believed that knowing these attorneys would affect their judgment in the case. (Tr. 47, 50-53). Another juror was a teacher who once taught the attorney who was prosecuting this defendant. However, this was 22 years in the past, and the juror had not seen the prosecutor in the meantime. (Tr. 239, 242). She was thoroughly questioned about whether this would influence her jury service, and she answered that she would be completely impartial and would not be swayed by the fact she once knew the prosecutor. (Tr. 239-242). Appellant then suggests teachers should have been challenged because they are mandatory reporters of child abuse. We note it was defense counsel who raised their mandatory report status with the teachers on the jury and obtained their assurance they could be impartial. (Tr. 184-187, 245-247).

{¶19} Appellant also complains about a juror with a daughter who recently started doing child advocacy work as an attorney in another state. However, this juror answered in the negative when asked by defense counsel if this would make her lean toward the state and the child-witnesses. (Tr. 132). Appellant also complains a juror had an ex-son-in-law who was a deputy sheriff where the sheriff's department conducted an investigation in the case. However, this was the only deputy she knew, and she assured the court she could be impartial. (Tr. 157-158). We note the only law enforcement officer who ended up testifying was a Youngstown police officer.

{¶20} Voir dire was conducted as to these jurors on the matters raised by Appellant. There was no indication that challenges for cause were warranted as to these jurors. Neither deficient performance by trial counsel nor prejudice is discernible

as a result of the lack of challenges for cause as to these jurors, and the subsequent failure to raise the issue on appeal was not ineffective assistance of appellate counsel. We note various other prospective jurors were excused for cause; a review of their situations shows the distinction between a proper challenge for cause and the contentions raised by Appellant in reopening.

{¶21} As for peremptory challenges, defense counsel excused three jurors (one of whom was a teacher). Although this left only one remaining peremptory challenge, Appellant suggests counsel should have eliminated all of the prospective jurors outlined above. "Decisions on the exercise of peremptory challenges are a part of trial strategy." *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 216, citing *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 99. The defense attorney who observed the jurors firsthand was in the best position to determine whether a certain person should be peremptorily challenged. *Id*. Upon reviewing the statements of the jurors, there is no indication appellate counsel rendered ineffective assistance by refraining from claiming trial counsel was ineffective for failing to exercise the last peremptory on one of these jurors in hopes the next juror would be preferable.

{¶22} Furthermore, Appellant claims challenges were not made as to most of these jurors because it "was never explained to appellant what challenges were." However, the trial court explained the questioning of the jury was to let the attorneys make decisions about whether they would be good jurors for the case. (Tr. 14-15). The court stated: "There are some what we call peremptory challenges and some challenges for cause." (Tr. 15). The court provided a lengthy example of when a challenge for cause can be used. (Tr. 15-16). Then, the court explicitly advised that peremptory challenges "are challenges the lawyer gets to use based on no reason, a good reason, a bad reason, it's just their feeling. After you have been practicing law for a long time, you just have a little instinct. Everybody is different. So if a lawyer thinks, Juror Number 1, I'm not sure, [then] they have a right to remove you. Has nothing to do with you, it has to do with what they believe they are looking for in a juror." (Tr. 16). Appellant has not demonstrated a genuine issue that appellate counsel was deficient or that any deficiency resulted in prejudice.

Proposed Assignment of Error Three: Prosecutorial Misconduct

{¶23} Appellant's third proposed assignment of error provides:

"Appellant was denied the right to effective assistance of counsel as guaranteed under the Sixth Amendment to the United States Constitution when trial counsel failed to object to the prosecutor's improper comments during the closing arguments."

{¶24} In reviewing a claim of prosecutorial misconduct in closing argument, the reviewing court is to evaluate whether remarks were improper and, if so, whether they prejudicially affected the defendant's substantial rights. *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990). The prosecution is afforded wide latitude in summation. *Id.* Furthermore, "[n]ot every intemperate remark by counsel can be a basis for reversal." *State v. Landrum*, 53 Ohio St.3d 107, 112, 559 N.E.2d 710 (1990) (the question is the fairness of trial, not the culpability of the prosecutor).

{¶25} Rather than viewing certain statements in isolation, the state's closing argument must be viewed in its entirety. *State v. Treesh*, 90 Ohio St.3d 460, 466, 739 N.E.2d 749 (2001). Furthermore, "comments made in direct response to arguments advanced by opposing counsel are unlikely to constitute a ground for reversal." *Cosgrove v. Omni Manor*, 2016-Ohio-8481, 78 N.E.3d 223, ¶ 57 (7th Dist.).

{¶26} First, Appellant complains the prosecutor said Appellant "ruled the house" and was "in control of this household and everybody in it." (Tr. 602). This was a mere characterization of the evidence. The prosecutor can comment freely on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990). "A prosecutor has the right to discuss the evidence and draw all reasonable inferences therefrom favorable to the prosecution's side of the case. He has the right to characterize, by proper language, the conduct of the defendant as disclosed by the evidence and to denounce the offense with which the accused is charged. He may draw his own conclusions, based upon the evidence, and, in argument, he may, in a proper way, state them to the jury and argue from such standpoint." *State v. Williams*, 7th Dist. No. 86 C.A. 147 (Feb. 13, 1991).

{¶27} Appellant also states the prosecutor told the jury he had an STD, which he transmitted to the children. What the prosecutor said was: "both of these girls tested positive for Trichomonas, a sexually transmitted disease. And they both had the same

one. Well, who were they both having sex with? Dad." (Tr. 605). These were merely pieces of information received as facts in evidence which the prosecutor placed together allowing the jury to draw their own conclusion.

{¶28} Next, Appellant says the prosecutor suggested he would have physically injured the children by stating in the rebuttal portion of closing arguments: "They don't know whether somebody is going to say, listen, I don't believe you, I'm taking you back to dad, and then they are going to get it worse than they have ever gotten it. They don't know what's gonna happen. They are kids." (Tr. 638). We note "it" appears to be a reference to sexual acts, and there was a plethora of testimony on the long-term sexual abuse of these children by their father. In any event, as we pointed out in the direct appeal, Child A gave examples of the punishment inflicted or threatened by Appellant. She testified: she would "'[g]et whooped with a belt, extension cord, get choked up, get kicked, get slapped, get punched"; he threatened he would "beat me until I die or he's gonna deny it and disown me"; he threatened "he would kill us" if the abuse were disclosed; and he said, "I brought you into this world, I can take you out." *State v. Miller*, 7th Dist. No. 17 MA 0120, 2018-Ohio-3430, ¶ 8, citing Tr. 408, 419-420, 425-426.

{¶29} Appellant also contests the statement: "granted, it's a crummy home, but it's all they have." (Tr. 639). Calling a home "crummy" where a child is expected to submit to sex with her father is an understatement and could cause no prejudice in this case. Appellant also believes the prosecutor engaged in inappropriate name-calling by labeling him the devil. Actually, the prosecutor used the phrase: "The devil that you know is better than the devil you don't." (Tr. 637). This is a common idiom used to say: "it is better to deal with a difficult person or situation one knows than with a new person or situation that could be worse." https://www.merriam-webster.com/dictionary.

{¶30} In any event, the last three contested comments were all in the prosecutor's rebuttal portion of closing arguments. They all related to the state's attempt to deflect a defense related to why a victim would allow this to happen for years without reporting it sooner. They were not random comments on character and did not unjustly construe the testimony provided at trial. Trial counsel was not ineffective for refraining from lodging objections to the comments listed in Appellant's reopening

application, and appellate counsel's failure to assign the issue as error on appeal was not deficient or prejudicial.

Proposed Assignment of Error Four: Lack of Witness

{¶31} The fourth assignment of error Appellant claims appellate counsel should have raised is as follows:

"Appellant was denied the effective assistance of counsel as guaranteed under the Sixth Amendment to the United States Constitution when trial counsel failed to call [a] defense witness to testify."

{¶32} Appellant points to his daughter's testimony that after she ran away from home, the police located her and brought her back even though she told a police officer that her father was doing things he should not be doing. (Tr. 381-381). A Youngstown police officer testified he was called to the house on July 28, 2015; when he arrived, Appellant reported his daughter ran away during an argument on discipline. (Tr. 481-483). This witness said he was not the officer who found, returned, or spoke to the child; he named the officer believed to be the one to locate the child. (Tr. 487, 492). Appellant contends defense counsel should have called this officer to testify.

{¶33} "Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *Treesh*, 90 Ohio St.3d at 490. In addition, the allegation of prejudice is speculative. The child's credibility (on having sex with her father) would not necessarily be damaged by testimony that she did not voice her precise situation to the officer who returned her to her house. Even if the officer would have testified that the child did not specify her father was sexually abusing her, he may not have understood the child was accusing her father of sexual abuse. For instance, the report to police alleged an argument over discipline, and at trial, the child answered affirmatively when asked by defense counsel if she told the officer she did not want to go back home because Appellant was "doing things to me that he shouldn't be doing."

{¶34} Moreover, the potential content of this officer's testimony is a matter outside of the record. If establishing ineffective assistance of counsel requires proof outside the record, then such claim is not appropriately considered on direct appeal. *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001). Accordingly,

appellate counsel did not render ineffective assistance of counsel by failing to assign this matter as error on appeal.

{¶35} For all of the foregoing reasons, Appellant's application to reopen is denied.

Presiding Judge Carol Ann Robb

Judge Gene Donofrio

Judge Kathleen Bartlett

NOTICE TO COUNSEL

This document constitutes a final judgment entry.