[Cite as *State v. Austin*, 2019-Ohio-4076.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MICHAEL L. AUSTIN, JR.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 16 MA 0068

Application to Reopen

BEFORE:
David A. D'Apolito, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Application Denied.

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

Atty. Timothy Young, Ohio Public Defender, and *Atty. Stephen Hardwick,* Assistant Public Defender, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for Defendant- Appellant.

Dated: September 27, 2019

PER CURIAM.

{¶1} On May 10, 2019, Appellant Michael L. Austin, Jr. filed a timely application to reopen his direct appeal pursuant to App.R. 26(B). In the application, Appellant predicates his ineffective assistance of appellate counsel claim on the identical due process arguments previously raised by his co-defendant and brother, Hakeem Henderson ("Henderson"), and, subsequently rejected by this Court on April 28, 2019, in *State v. Henderson,* 7th Dist. Mahoning No. 16 MA 0057, 2019-Ohio-1760. The state filed its response brief on May 29, 2019.

{¶2} On March 29, 2019, we affirmed Appellant's conviction and sentence for three counts of aggravated murder and one count of murder, with firearms specifications, and one count of engaging in a pattern of corrupt activity, with an enhancement based upon a prior felony conviction. *State v. Austin*, 7th Dist. Mahoning No. 16 MA 0068, 2019-Ohio-1185, appeal not allowed, 156 Ohio St.3d 1447, 2019-Ohio-2498, 125 N.E.3d 917 (2019). Appellant was sentenced to life without parole for each of the three aggravated murder convictions, plus three years for each of the corresponding firearms specifications; fifteen years to life for the murder conviction, plus three years for the corresponding firearms specification; and eleven years for the pattern of corrupt activity conviction. Each of the sentences for the substantive convictions were imposed to run consecutively to the others.

{¶3} In his direct appeal, Appellant asserted seven assignments of error. Appellant argued that the trial court abused its discretion in admitting certain testimonial evidence at trial. He also challenged the constitutionality of his non-reviewable sentences for aggravated murder and murder, as well as the lawfulness of his sentence, and the imposition of sentences consecutive to a sentence of life without parole.

{¶4} Pursuant to App.R. 26(B)(1), a criminal defendant "may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." An applicant must demonstrate that "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). If the application is granted, the appellate court must appoint counsel to represent the applicant if the applicant is indigent and unrepresented.

App.R. 26(B)(6)(a). An application for reopening must contain "[o]ne 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). See also *State v. Clark*, 7th Dist. Mahoning No. 08 MA 15, 2015-Ohio-2584, ¶ 19.

{¶5} In order to show ineffective assistance of appellate counsel, the applicant must meet the two-prong test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Pursuant to *Strickland*, the applicant must demonstrate both deficient performance of counsel and resulting prejudice. *Id.* at 687, App.R. 26(B)(9). To show ineffective assistance of appellate counsel, Appellant must prove that his counsel was deficient for failing to raise the issues that Appellant now presents and that there was a reasonable probability of success had they presented those claims on appeal. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

{¶6} There is a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *Id.* at 142-143, citing *Strickland*, 466 U.S. at 689. Appellate counsel has considerable discretion to choose the errors to be assigned on appeal and focus on the arguments perceived as the strongest. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 7. Appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. *Id.*

{¶7} In his first assignment of error, captioned "Merit one," Appellant argues that "[his] rights to due process and fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated by various instances of prosecutorial misconduct." (App., p. 3.) Because no objection was made during closing argument, plain error is the applicable standard.

{¶8} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Landrum*,

53 Ohio St.3d 107, 111, 559 N.E.2d 710 (1990), quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶9} To recognize plain error, we must find an obvious error which prejudiced Appellant by affecting his substantial rights, which requires a finding that there is a reasonable probability that the error resulted in prejudice. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22. Invocation of plain error is discretionary. *Id.* at ¶ 23.

{¶10} Appellant alleges that the prosecutors bolstered the testimony of the state's witnesses and attacked the integrity of defense counsel during closing argument. Appellant cites to inconsistencies in the testimony of the state's witness for the proposition that the prosecutor's improper bolstering gave the state's witnesses a veneer of reliability.

{¶11} The prosecution is afforded wide latitude in summation and is permitted to fairly comment on the testimony and evidence. *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990). Contested statements made during closing arguments are not viewed in isolation but in context and considering the arguments in their entirety. *State v. Treesh*, 90 Ohio St.3d 460, 466, 739 N.E.2d 749 (2001). When reviewing a claim of prosecutorial misconduct during closing arguments, we evaluate whether remarks were improper and, if so, whether they prejudicially affected the defendant's substantial rights. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 168 (2002), citing *State v. Hessler*, 90 Ohio St.3d 108, 125, 734 N.E.2d 1237 (2000).

{¶12} A prosecutor is not permitted to vouch for the credibility of a witness at trial. Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue. *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138 (2018). Further, the prosecutor may not express a personal belief or opinion as to the credibility of a witness. *Id.* Similarly, it is improper for the prosecutor to denigrate or impute insincerity to defense counsel in the jury's presence. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 304.

{¶13} During closing argument, the prosecutor plainly stated that several of the state's witnesses were "telling the truth." The prosecutor characterized the testimony of one of the state's witness as "bulletproof," and argued that defense counsel's cross-examination of the witness revealed the defense's "desperation." (Tr. 1576, 1591-1592).

{¶14} Henderson challenged the very same statements by the prosecutor during closing arguments in his application to reopen. We opined that the disputed statements did not imply facts outside of the record, and that they were made in the context of discussing the corroborating evidence or the evidence countering a witness's motive to lie. *Henderson* at ¶ 10, citing *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 120. Recognizing that the question before us was the fairness of trial, not the culpability of the prosecutor, we concluded that there was no reason to believe the jury did not follow the court's instruction that closing arguments were not evidence, and, further, that the jurors were the sole judges of the credibility of the witnesses. *Id.*, citing *State v. Loza*, 71 Ohio St.3d 61, 79, 641 N.E.2d 1082 (1994) (it is presumed the jury will follow the instructions given by the judge).

{¶15} Defense counsel, in his closing argument, asserted that the state pressured witnesses to manufacture testimony to win a conviction. During the prosecutor's rebuttal, he posited that, if the state were inclined to manufacture evidence, it could have planted fingerprint and DNA evidence. The court sustained a contemporaneous objection by defense counsel and instructed the state to move forward with the argument. (Tr. 1648). The prosecutor thereafter provided examples of evidence that could have been provided to strengthen the state's case, and concluded, "I mean, let's face it, if we're going to lie, let's really lie." (Tr. 1651).

{¶16} We have previously observed that a prosecutor's comments directly responding to arguments advanced by the defense are unlikely to constitute grounds for reversal. *State v. Miller*, 7th Dist. Mahoning No. 17 MA 0120, 2018-Ohio-5127, ¶ 25. With respect to the specific comments at issue here, we opined in *Henderson, supra,* that "[t]he response by the state, even if exaggerated, did not give rise to concerns about a fair trial. Prejudice is not apparent." *Henderson* at ¶13.

{¶17} Because prejudice is not apparent from the record, we find that the prosecutor's comments did not affect Appellant's substantial rights. We further find that appellate counsel's failure to raise prosecutorial misconduct in Appellant's direct appeal did not constitute ineffective assistance of counsel.

{¶18} In "Merit two," Appellant asserts that "[his] right of due process and fair trial under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and

Section Ten Article One of the Ohio Constitution were violated when [the] trial court overruled a motion for mistrial. When [sic] unlawful contact with the juror regarding this case during trial."

{¶19} Where there is claim that improper contact with a juror caused that juror or members of the jury to be biased, the defense must establish actual bias at the hearing on the topic. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 160. A trial court has broad discretion in dealing with the juror contact and determining whether to declare a mistrial; the granting of a mistrial is necessary only when a fair trial is no longer possible. *Id.*

{¶20} The trial court conducted a hearing on the comments made to Juror #3. Juror #3 explained that he walked by two gentlemen while he was wearing his "juror" badge, and overheard one them say "You're on the jury? You gotta be fair." Juror #3 conceded that he "scooted by" the gentlemen quickly and made no eye contact, and, as a consequence, he could not identify them. (*Id.*) Juror #3 warranted that the interaction would not affect his impartiality because "[he] didn't perceive it as a threat." Juror #3 reported it to the trial court after he mentioned the comment to Alternate Juror #1, in front of the entire jury. (Tr. 1035-1036).

{¶21} In seeking a mistrial, defense counsel pointed to reservations expressed by two jurors regarding their ability to remain impartial. (Tr. 1091-1092). Appellant predicates Merit two on the trial court's colloquy with Juror #5:

> THE COURT: Does the concern you have rise to the level where you would be unable to render a verdict based solely upon the evidence you hear during the trial, the arguments of counsel, and the instructions of law from the court?
>
> JUROR [#5]: I'm not so sure now. I mean, I'm not – I can't say yes. I can't say no. But since we're all being called in it seems like it's a very serious problem. It's not like one person and, you know, it's over and done with.

> THE COURT: Between you and me, it's not a serious problem. It's something that the law requires that I address individually just to make sure that everyone can still be fair and impartial based on what occurred.
>
> JUROR [#5]: Well, I can be fair and impartial, you know, because there's two sides, you know, but it would make me a little edgy, I would imagine. I think it would make anyone edgy, you know, after what I overheard today.
>
> THE COURT: I guess that's the ultimate question. It's only one that you can answer. Whether you call it edgy or fear or whatever the case is, would that affect your ability to render a verdict?
>
> JUROR [#5]: I – I think I could render a verdict. It might be a little more difficult now than it was a few days ago.

(Tr. 1056-57.)

{¶22} After assurances by the trial court that the jury would be escorted to their vehicles each evening and that their anonymity had been maintained, Juror #5 warranted that he could return a verdict based on the evidence, arguments of counsel, and the instruction of the court. (Tr. 1059).

{¶23} The trial court questioned each of the jurors and informed them their addresses were not public, no photographs or cell phones were allowed in the courtroom, and deputies would escort them to their vehicles. All jurors ultimately answered they could render a verdict solely on the evidence and be impartial. The court declared its satisfaction that the jury could be fair and impartial based on its evaluation of each individual juror. (Tr. 1091).

{¶24} A trial court is permitted to rely on a juror's testimony in determining that juror's impartiality. *State v. Herring* (2002), 94 Ohio St.3d 246, 259, 762 N.E.2d 940; *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, at ¶ 114. Further, as we opined in *Henderson, supra,* the trial judge was in the best position to observe the jurors as they were being questioned and determine whether the incident affected their

ability to remain impartial. *Henderson* at ¶ 17, citing *Conway*, 108 Ohio St.3d 214 at ¶ 163, *Herring* at 259.

{¶25} Having reviewed the transcript of the chambers hearing, we find no evidence of actual juror bias. We further find that appellate counsel's failure to raise juror bias in Appellant's direct appeal did not constitute ineffective assistance of counsel.

{¶26} In his application to reopen, Appellant has failed to establish a genuine issue as to whether he was deprived of the effective assistance of counsel in his direct appeal. Accordingly, Appellant's application to reopen is denied.

JUDGE DAVID A. D'APOLITO

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB

NOTICE TO COUNSEL

This document constitutes a final judgment entry.