[Cite as *State v. Atwater*, 2020-Ohio-484.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 107182
v.	:	
JOSEPH ATWATER,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: February 7, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-17-623180-A
Application for Reopening
Motion No. 529546

Appearances:

Mary Catherine Corrigan and Allison F. Hibbard, *for appellant*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Tasha Forchione, Assistant Prosecuting Attorney, *for appellee*.

MARY EILEEN KILBANE, P.J.:

{¶ 1} On June 19, 2019, the applicant, Joseph Atwater, pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 61, 584 N.E.2d 1204 (1992), applied to

reopen this court's judgment in *State v. Atwater*, 2019-Ohio-986, 132 N.E.2d 1294 (8th Dist.), in which this court affirmed his conviction and sentence for rape with a sexually violent predator specification. Atwater now asserts that his appellate counsel should have argued that his convictions were against the manifest weight of the evidence; that his trial counsel was ineffective for not engaging in reciprocal discovery, which prevented him from impeaching the victim; the trial court abused its discretion by not allowing defense counsel to use an audio recording in cross-examining the victim, which violated his right to cross-examination; and trial counsel was ineffective for not objecting to hearsay evidence. The state of Ohio filed its brief in opposition on July 1, 2019. For the following reasons, this court denies the application to reopen.

{¶ 2} Atwater's younger female cousin reported that Atwater had sexually abused her, including raping her, multiple times over the last 11 years since she was five years old. The state indicted Atwater for five counts of rape with sexual predator specifications, four counts of kidnapping with sexual motivation specifications, one count of attempted rape, and one count of burglary.

{¶ 3} During a trial to the bench, the cousin testified about what Atwater had done to her. Other witnesses including her mother, her teacher, her principal, and police officers, testified as to the steps taken in the investigation. A forensic scientist for the Ohio Bureau of Criminal Investigation testified that DNA testing revealed that Atwater's sperm was found in the cousin's underwear from the most recent incident.

{¶ 4} The trial judge found Atwater guilty of rape and kidnapping for the most recent incident, including the specifications, but not guilty of the other charges. The trial judge merged the rape and kidnapping counts and sentenced Atwater to ten years to life and classified him as a Tier III sex offender. Atwater's appellate counsel argued (1) that it was improper to charge him with a sexually violent predator specification when he had no prior convictions for a sexually violent offense and (2) that it was error to impose a life sentence.

{¶ 5} An application for reopening must be granted "if there is a genuine issue as to whether a defendant has received ineffective assistance of appellate counsel on appeal." App.R. 26(B)(5). The Ohio Supreme Court has held that the two-pronged analysis found in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the appropriate standard when assessing whether an applicant has raised a "genuine issue" as to the ineffectiveness of appellate counsel in a request to reopen an appeal per App. R. 26(B). *State v. Myers* 102 Ohio St.3d 318, 2004-Ohio-3075, 810 N.E.2d 436.

{¶ 6} Pursuant to *Strickland,* the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); and *State v. Reed,* 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456.

{¶ 7} In *Strickland,* the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that

it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* at 689.

{¶ 8} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.

{¶ 9} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a

reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 10} Moreover, appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898); *Carran v. Soline Co.*, 7 Ohio Law Abs. 5 (1928); and *Republic Steel Corp. v. Sontag*, 21 Ohio Law Abs. 358 (1935). "Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel." *State v. Burke* 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶ 10.

{¶ 11} Atwater's first argument is that his convictions are against the manifest weight of the evidence. He proposes that the cousin's inconsistencies, some impeachment, and the not guilty verdicts for the earlier offenses establish that the cousin's testimony is incredible. However, the cousin's testimony combined with the forensic evidence provides substantial evidence from which the trier of fact could reasonably conclude that all the elements had been proven beyond a reasonable doubt. The judge did not lose his way and create a miscarriage of justice. *State v. Williams,* 99 Ohio St.3d 493, 2003-Ohio-4346, 794 N.E.2d 27; and *State v. Monroe,* 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285. Moreover, Atwater cannot show prejudice. This court implicitly rejected a manifest weight argument

when it ruled that "the record supports the trial court's determination that Atwater was a sexually violent predator." *Atwater*, 2019-Ohio-986, at ¶ 25.

{¶ 12} The court will consider Atwater's second and third arguments together. Defense counsel had an investigator interview the cousin shortly before trial and record the conversation. Defense counsel tried to send a copy of the recording to the prosecuting attorneys the evening before trial. Because of computer difficulties neither of the two prosecuting attorneys were able to review the recording. Just before defense counsel began his cross-examination of the cousin, the state raised the problem to the trial court. After confirming that neither prosecuting attorney had heard the recording, defense counsel proposed that he could send the 45-minute recording again to allow the prosecution to prepare. The trial judge responded: "And now in the middle of trial you're proposing to introduce this and to — no, I am not going to allow it." (Tr. 72.) From this Atwater argues that his trial counsel was ineffective because he did not engage in reciprocal discovery and precluded himself from effectively cross-examining the cousin. Alternatively, he argues that the trial court abused its discretion in not allowing defense counsel to use the audio tape for any purpose, including cross-examination. Thus, Atwater complains that he was denied his Sixth Amendment rights to effective assistance of trial counsel and to cross-examination.

{¶ 13} However, appellate counsel was not deficient for failing to argue these issues, because he could not establish prejudice. Atwater does not state what was in the recording nor does he offer it for our consideration. He does not show where in

the record it was proffered, nor could this court find such a proffer. Without knowing what was in the recording, this court could only speculate whether it would have made a difference in impeaching the cousin and in the trial. Speculation does not establish prejudice. In *State v. Bridges,* 8th Dist. Cuyahoga No. 100805, 2015-Ohi-1447, ¶ 13, this court ruled that "[a]ppellate counsel could not have successfully raised any of these arguments in the direct appeal because they would require speculation or consideration of evidence that is outside of the record." *State v. Abdul,* 8th Dist. Cuyahoga No. 90789, 2009-Ohio-6300; *State v. Piggee,* 8th Dist. Cuyahoga No. 101331, 2015-Ohio-596.

{¶ 14} Atwater's final argument is that he was denied his Sixth Amendment right to effective assistance of trial counsel because his trial counsel repeatedly failed to object to hearsay testimony. After the cousin testified, her mother, the cousin's teacher, the principal, and police officers testified on the course of the investigation, including what they learned from talking with the cousin and the mother. During these witnesses' direct examinations, defense counsel objected at least six times. Nevertheless, Atwater now complains that his trial counsel was deficient for allowing improper hearsay to be presented.

{¶ 15} In *State v. Campbell,* 8th Dist. Cuyahoga Nos. 100246 and 100247, 2014-Ohio-2181; and *State v. Thompson,* 8th Dist. Cuyahoga No. 99846, 2014-Ohio-1056, this court observed that the main premise behind the hearsay rule is that the adverse party is not afforded the opportunity to cross-examine the declarant. Thus, when the declarants — in this case the cousin and the mother — are subject to

cross-examination, any error in allowing such hearsay is harmless error. Furthermore, this case was a trial to the court, and it is presumed that the trial judge follows the rule of evidence and renders a decision on the proper evidence. *Campbell,* 2014-Ohi0-2181, at ¶ 16 and 18. Even in excluding any possible hearsay evidence, the cousin's testimony and the DNA evidence supported the conviction. There is no prejudice, and appellate counsel in the exercise of professional judgment could properly decline to argue this issue. Atwater fails to raise "a genuine issue" as to whether he was deprived of the effective assistance of counsel on appeal.

{¶ 16} Accordingly, the court denies the application to reopen.

MARY EILEEN KILBANE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
MICHELLE J. SHEEHAN, J., CONCUR