[Cite as *State v. Newman*, 2020-Ohio-658.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 107060

v. :

DAZELLE NEWMAN, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: February 25, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-16-611461-A
Application for Reopening
Motion No. 530038

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony T. Miranda, Assistant Prosecuting Attorney, *for appellee.*

The Law Offices of Donald Gallick, Donald M. Gallick, *for appellant.*

RAYMOND C. HEADEN, J.:

{¶ 1} Applicant, Dazelle Newman ("Newman"), timely seeks to reopen his appeal, *State v. Newman*, 8th Dist. Cuyahoga No. 107060, 2019-Ohio-1367. He asserts three proposed assignments of error:

I. The convictions for attempted murder and related offenses were against the manifest weight of the evidence and not supported by a sufficiency of the evidence as the witness identification was established through on [sic] prosecutorial misconduct.

II. Defendant's constitutional rights were denied due to plain error and ineffective assistance of counsel from the failure to file a motion to suppress witness identification.

III. Defendant's sentence is contrary to law because the record shows that the trial court crafted a cumulative sentence using "sentencing packaging" doctrine.

{¶ 2} For the reasons that follow, the application is denied.

Procedural and Substantive History

{¶ 3} Newman was involved in a shooting that took place on May 9, 2016, where he attempted to rob Denzel Harris ("Harris") while Harris was stopped in his car. Newman was convicted of attempted murder, aggravated robbery, robbery, felonious assault, and having weapons while under disability. He was sentenced to an aggregate 25-year prison term. Newman appealed his convictions, arguing that trial counsel was ineffective when counsel failed to object to certain testimony. *Newman* at ¶ 14. This court overruled the sole assignment of error and affirmed Newman's convictions. *Id*. at ¶ 24.

{¶ 4} Newman timely filed an application for reopening pursuant to App.R. 26(B). The state responded with a brief in opposition.

Law and Analysis

Standard for Reopening

{¶ 5} App.R. 26(B) provides a limited means of asserting a claim of ineffective assistance of appellate counsel. App.R. 26(B)(5) states that "[a]n

application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." To prevail, Newman must set forth a "colorable claim" of ineffective assistance of appellate counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). *State v. Sanders*, 75 Ohio St.3d 607, 665 N.E.2d 199 (1996). Under the *Strickland* standard, Newman must demonstrate: (1) Counsel was deficient in failing to raise the issues he now presents; and (2) Newman had a reasonable probability of success if the issue had been presented on appeal. *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

Prosecutorial Misconduct

{¶ 6} Newman claims that improper tactics were used by the prosecution to secure convictions that were otherwise not supported by sufficient evidence or against the manifest weight of the evidence. Newman's proposed assignment of error implicitly concedes that his convictions are supported by sufficient evidence and not against the manifest weight of the evidence when gauged against all the evidence that was adduced at trial. However, he asserts that certain evidence should not have been allowed. So, this court will examine whether Newman has asserted a colorable claim of ineffective assistance of appellate counsel in this regard.

{¶ 7} "The test for prosecutorial misconduct is whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Smith*, 87 Ohio St.3d 424, 442, 721 N.E.2d 93 (2000), citing *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). "The touchstone of analysis

'is the fairness of the trial, not the culpability of the prosecutor.'" *Id*., quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

{¶ 8} Newman indicates that no objection was raised to the following claims of prosecutorial misconduct. The fact that no objection was raised means that appellate counsel would be required to show that this testimony and prosecutorial misconduct amounted to plain error. *State v. White*, 82 Ohio St.3d 16, 22, 693 N.E.2d 772 (1998) ("Since defense counsel failed to object to the alleged instances of prosecutorial misconduct, the alleged improprieties are waived, absent plain error.")

{¶ 9} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Civ.R. 52(B). "A forfeited error is not reversible error unless it affected the outcome of the proceedings and reversal is necessary to correct a manifest miscarriage of justice." *State v. Thomas*, 2018-Ohio-1081, 109 N.E.3d 616, ¶ 50 (8th Dist.).

{¶ 10} Newman claims that the prosecutor went beyond the bounds of appropriate trial advocacy in numerous ways: (1) by phrasing a question to a witness that she was on "zero" PCP at the time of the shooting (tr. 512); (2) the prosecutor elicited perjured, or at the very least, unbelievable testimony from another witness; (3) the prosecutor committed misconduct during the testimony of a police officer that interviewed witnesses shortly after the shooting; and (4) the prosecutor went beyond the bounds of appropriate trial tactics when questioning another witness by badgering and harassing her.

{¶ 11} During the pretrial phase, the state requested that it be allowed to call Samantha Harrison ("Harrison") as a hostile witness, or in the alternative, as a court's witness because Harrison, a passenger in the car with Harris when he was shot, had provided a written statement retracting previous statements identifying Newman as the gunman. In her most recent statement she indicated that she was high on PCP at the time of the shooting and that's why her former statements were incorrect. (Tr. 58-60.) At trial, Harrison testified that she smoked PCP the night of the shooting. (Tr. 495.) Through questioning, the state attempted to show that Harrison was not high on PCP that night.

{¶ 12} During the testimony of Dr. Aisha Violette, the physician who treated Harrison for the wounds she sustained as a result of the shooting, the state asked numerous questions about Harrison's physical condition. Dr. Violette testified that Harrison did not appear to be under the influence of PCP while at the hospital and the "labs didn't pick up any influence of drugs, correct, not the ones I recall." (Tr. 453.) The state also highlighted the lack of PCP in lab results contained in Harrison's medical records. (Tr. 503.)

{¶ 13} This was not the prosecutor testifying, as Newman claims in support of his argument that the prosecutor acted improperly during trial. The line of questioning was appropriate given the recantation of prior statements and the stated reason for the recantation. "'Prosecutors are entitled to latitude as to what the evidence has shown and what inferences can reasonably be drawn from the evidence.'" *State v. Mason*, 82 Ohio St.3d 144, 162, 694 N.E.2d 932 (1998), quoting

State v. Smith, 80 Ohio St.3d 89, 111, 684 N.E.2d 668 (1997). Further, "'[a] prosecutor may state his opinion if it is based on the evidence presented at trial.'" *Id.*, quoting *State v. Watson*, 61 Ohio St.3d 1, 10, 572 N.E.2d 97 (1991).

{¶ 14} Newman next claims that the testimony of Harris was so incredible that to elicit it amounted to prosecutorial misconduct.

{¶ 15} Harris testified that a man approached his car as he was stopped. The man was holding a revolver and put the gun through Harris's open window and said "run your pockets," which Harris understood to mean he was being robbed. Harris struggled with the man and several shots were fired into the vehicle while the two fought over the firearm. During the struggle, Harris lifted the right sleeve of the gunman's shirt, revealing a tattoo. Harris said that during the skirmish, he was trying to separate the gunman's hand from the gun and he slid the gunman's sleeve up. (Tr. 349.) Harris testified that the tattoo was of a skull with a flame on it and placed about midway up the gunman's upper arm. (Tr. 350.) During trial, Newman was required to roll up his sleeve, and Harris was able to view Newman's right bicep and found that the tattoo on Newman was the same as the one on the gunman that approached his vehicle and shot him. (Tr. 354.)

{¶ 16} "Prosecutorial misconduct via the presentation of perjured testimony requires the defendant to show that the prosecution knew the testimony was false." *State v. Clark*, 7th Dist. Mahoning No. 08 MA 15, 2015-Ohio-2584, ¶ 24, citing *State v. Iacona*, 93 Ohio St.3d 83, 97, 752 N.E.2d 937 (2001).

{¶ 17} There is no evidence in the record that the prosecutor knew Harris's testimony was false. Further, it is not so unbelievable that during a struggle for a firearm clothing would be displaced. There is no evidence that this testimony, even if unbelievable, was knowingly false and elicited by actions of the prosecutor. *See State v. Hillman*, 10th Dist. Franklin Nos. 06AP-1230 and 07AP-728, 2008-Ohio-2341, ¶ 29. Therefore, this does not amount to prosecutorial misconduct.

{¶ 18} Newman next claims that when questioning Victoria Bascon ("Bascon"), another passenger in the car that Harris was driving, the state badgered her, taunted her, and acted inappropriately.

{¶ 19} During Bascon's testimony, the state asked that she be treated as hostile on the basis of surprise. The record discloses that just prior to her testimony, she spoke with the prosecutor and a Cuyahoga County sheriff's deputy and stated that she could identify the individual that shot at the driver of the vehicle in which she was riding. However, during her testimony, she indicated that she could not identify the shooter and did not see his face.

{¶ 20} The questioning that followed was contentious, but did not stray beyond the bounds of proper questioning within the various rules of procedure. For instance, Newman claims that the prosecutor taunted the witness about the length of time she took to answer questions. However, even the trial court commented on the length of time it took for the witness to answer simple questions: "Ma'am, it's clear during your testimony, it was stilted. It was long delays in questions that should have produced — are you under some type of threat — has someone

threatened you?" (Tr. 426.) The prosecutor's questioning was not inappropriate under these circumstances.

{¶ 21} Similarly, Newman points to the testimony of a police officer, Jacqueline Bennett ("Bennett"), regarding a witness identification of the shooter. (Tr. 370-382.) However, the solicitation of this testimony, to which no objection was raised, does not constitute prosecutorial misconduct. This argument does not present a reason to grant the application for reopening.

{¶ 22} Plain error does not exist in this record to establish that prosecutorial misconduct deprived Newman of a fair trial. There is no probability of a different outcome had appellate counsel raised prosecutorial misconduct on appeal. Therefore, Newman has not set forth a colorable claim that appellae counsel was ineffective for failing to raise this as an assignment of error.

Suppression of Witness Identification

{¶ 23} Newman next argues that trial counsel was ineffective for not filing a motion to suppress eyewitness identifications of Newman. Newman also asserts that this amounts to plain error. First, he claims that Harris's identification of Newman's tattoo should have been challenged as unreliable. Second he claims that Harrison testified she did not recognize the shooter, but the state "decided to testify in contradiction of the witness and challenged her honesty on the witness stand." (Application for reopening at page 6.)

{¶ 24} A motion to suppress has a specific use. It is a

> "[d]evice used to eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self[-]incrimination[1]), or the Sixth Amendment (right to assistance of counsel, right of confrontation etc.), of [the] U.S. Constitution."

State v. French, 72 Ohio St.3d 446, 449, 650 N.E.2d 887 (1995), quoting *Black's Law Dictionary* 1014 (6th Ed.1990). "When a witness has been confronted with a suspect before trial, due process requires a court to suppress her identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances." *State v. Waddy*, 63 Ohio St.3d 424, 438, 588 N.E.2d 819 (1992), citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

{¶ 25} The same analysis can apply to an in-court identification. *State v. Johnson*, 163 Ohio App.3d 132, 2005-Ohio-4243, 836 N.E.2d 1243 (10th Dist.), citing *United States v. Hill*, 967 F.2d 226 (6th Cir.1992).

> When determining whether an identification is admissible, the Sixth Circuit Court of Appeals follows a two-step analysis. The first step is to determine whether the identification procedure was impermissibly suggestive. The second step is to determine whether "under the totality of the circumstances, the identification was nonetheless reliable and therefore admissible."

(Citations omitted.) *Id.* at ¶ 52.

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[1] The physical exhibition of a characteristic of a defendant does not implicate a Fifth Amendment privilege against self-incrimination. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), at paragraph one of the syllabus. *See also State v. Carpenter*, 8th Dist. Cuyahoga No. 45049, 1983 Ohio App. LEXIS 15162 (May 12, 1983).

{¶ 26} Some of the facts that have been used to analyze whether an identification is sufficiently reliable include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Biggers* at 199.

{¶ 27} Newman has not claimed that the state used unduly suggestive identification procedures. Instead, Newman claims that Harris's identification of Newman's tattoo is so unbelievable that it should be deemed unreliable. When the first prong of the above test is not satisfied, an analysis of the second prong is unnecessary. *State v. Hughes*, 10th Dist. Franklin No. 18AP-837, 2019-Ohio-4590, ¶ 8. If this court assumes for the sake of argument that the first prong is satisfied, there are indicia of reliability for Harris's identification of Newman as the assailant that shot him. Harris testified about the close nature of the confrontation between him and the assailant. Harris described the gun the assailant had in great detail. He also described, in detail, a tattoo the assailant had and its position on the assailant's body. He identified the tattoo that Newman had on his upper arm as the same tattoo and in the same location as the assailant that shot him. Under the totality-of-the-circumstances test for reliability, there exists sufficient indicia of reliability for the in-court identification to be admissible.

{¶ 28} Whether Newman's testimony is unbelievable is not a question of admissibility, but credibility. Credibility determinations are generally for the trier

of fact to decide. *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). The jury heard the testimony of Harris and he was subject to cross-examination. Filing a motion to suppress this in-court eyewitness identification would not have resulted in the exclusion of this testimony.

{¶ 29} Second, Newman claims that Harrison testified she did not recognize the shooter, but the state "decided to testify in contradiction of the witness and challenged her honesty on the witness stand." A motion to suppress would not address this non-identification of Newman as the assailant or the state's alleged improperly "testifying" at trial.

{¶ 30} Had Newman filed a motion to suppress arguing these points, there is no probability of success. Asserting that an assignment of error should have been raised but was not is only the first prong of the test used to judge ineffective assistance of appellate counsel. The second prong defines a "colorable claim" of ineffective assistance of appellate counsel in terms of a reasonable probability of success. *Spivey*, 84 Ohio St.3d at 25, 701 N.E.2d 696 (1998). Therefore, Newman has not asserted a colorable claim of ineffective assistance of appellate counsel.

Sentencing-Package Doctrine

{¶ 31} Newman asserts that the trial court treated the sentences in this case as a sentencing package, rather than imposing individual sentences.

{¶ 32} Ohio has rejected the sentencing-packaging doctrine: "We specifically rejected the 'sentencing package' doctrine, which, as we explained, requires a 'court to consider the sanctions imposed on multiple offenses as the

components of a single, comprehensive sentencing plan.'" *State v. Evans*, 113 Ohio St.3d 100, 2007-Ohio-861, 863 N.E.2d 113, ¶ 11, quoting *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 5.

> The sentence package doctrine provides that, when a defendant is sentenced under a multi-count indictment and the sentences imposed on those counts are interdependent, the trial court has the authority to reevaluate the entire aggregate sentence, including those on the unchallenged counts, on remand from a decision vacating one or more of the original counts. *In the Matter of Fabiaen L. Mitchell* (June 28, 2001), Franklin App. No. 01AP-74, 2001 Ohio App. LEXIS 2856. The underlying theory is that, in imposing a sentence in a multi-count conviction, the trial court typically looks to the bottom line, or the total number of years. *Id.* Thus, when part of a sentence is vacated, the entire sentencing package doctrine becomes 'unbundled,' and the trial judge is, therefore, entitled to resentence a defendant on all counts to effectuate its previous intent. *Id.*

State v. Jackson, 10th Dist. Franklin No. 03AP-698, 2004-Ohio-1005, ¶ 5. The sentencing-package doctrine is a federal doctrine that is inapplicable to Ohio courts. *Saxon* at ¶ 10.

{¶ 33} In Ohio, individual sentences are not interdependent. A sentencing judge has discretion to impose any individual sentence that complies with applicable sentencing statutes. *State v. Franklin*, 8th Dist. Cuyahoga No. 107482, 2019-Ohio-3760, ¶ 41. If a sentence falls within the statutory range for that offense, there is a presumption of validity if the court considered the applicable sentencing factors. *Id.*, citing *State v. Pavlina*, 8th Dist. Cuyahoga No. 99207, 2013-Ohio-3620, ¶ 15, citing *State v. Collier*, 8th Dist. Cuyahoga No. 95572, 2011-Ohio-2791, ¶ 15. However, the *Saxon* Court went on to note,

> [A] judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense. *See* R.C. 2929.11 through 2929.19. Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively. *See State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus, ¶ 100, 102, 105; R.C. 2929.12(A); *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. Under the Ohio sentencing statutes, the judge lacks the authority to consider the offenses as a group and to impose only an omnibus sentence for the group of offenses.

Saxon at ¶ 9.

{¶ 34} In the present case, the trial court imposed valid individual sentences that it felt were appropriate, and determined to run some of those sentences consecutive to each other to arrive at a 25-year aggregate sentence. While the trial court had difficulty in arriving at a 25-year sentence due to some mathematical errors, and adjusted a few of the individual sentences to correct those errors, the court did not impose only an omnibus sentence.

{¶ 35} The trial court imposed individual sentences that consisted of two three-year gun specifications to be served prior and consecutive to an 11-year sentence on Count 1, attempted murder, and consecutive to an eight-year sentence on Count 3, aggravated robbery. (Tr. 793-795.) The court imposed sentences for the other counts, which were ordered to be served concurrent to the above sentences. *Id*.

{¶ 36} Initially, the trial court mistakenly imposed a 14-year sentence on Count 1. (Tr. 790.) The maximum sentence for Count 1, a first-degree felony, was

actually 11 years. After a discussion with counsel, the trial court imposed an 11-year sentence on Count 1, imposed other sentences, and maintained a 25-year aggregate sentence.

{¶ 37} Trial courts are authorized to impose any individual sentence within the statutory range and are granted latitude to order those sentences be served consecutive to each other where the situation warrants.

{¶ 38} The trial court's statements at the sentencing hearing indicate that the court imposed individual sentences on each count and considered an overall sentence that was appropriate when factoring in proper considerations under R.C. 2929.11, 2929.12, and 2929.14(C)(4). This does not implicate the sentencing-package doctrine.

{¶ 39} Newman claims the trial court's sentencing decision was improper because the court had in mind an overall sentence of 25 years, but Newman has failed to cite to any case from this district that has found error in an analogous situation. On the other hand, this court rejected a similar argument to the one Newman now raises in *State v. Miller*, 8th Dist. Cuyahoga No. 106051, 2018-Ohio-2127. There, the trial court imposed individual sentences on each count, but also stated that "'the real issue is not whether I give you concurrent or consecutive sentences. To me, the real issue is how much time you get.'" *Id.* at ¶ 18. This court rejected the argument that the trial court's statement indicated that it engaged in an impermissible sentencing package.

{¶ 40} When one appellate court reviewed a case where a trial judge imposed an overall sentence to achieve an improper purpose, that court found the sentence constituted an impermissible sentencing package. *State v. Parker*, 193 Ohio App.3d 506, 2011-Ohio-1418, 952 N.E.2d 1159 (2d Dist.). There, the Second District ruled that a trial court erred when imposing sentence because the court considered all the sentences together to achieve an improper purpose — to "insure that this victim would not wait on Parker to complete his sentence so they could have a future together, and to that end the court sought to impose a particular overall and more lengthy sentence to cover the group of offenses to satisfy the purposes and principles of sentencing." *Id*. at ¶ 96.

{¶ 41} However, courts, including the Second District, have distinguished *Parker* where no improper purpose existed on the record. For instance, the Second District later distinguished the holding in *Parker*, stating: "Unlike the circumstances in *Parker*, the court did not put forth an improper reason for the length of [the defendant's] combined sentences. *See Parker* at ¶ 96[.]" *State v. Lambert*, 2d Dist. Champaign No. 2018-CA-28, 2019-Ohio-2837, ¶ 38. *See also State v. Cameron*, 2d Dist. Clark No. 2012-CA-86, 2013-Ohio-4397, ¶ 18 (distinguishing *Parker* because the trial court in *Cameron* "did not express an improper reason for the sentence it imposed"). The *Lambert* court found no error in sentencing when an appellant alleged that the trial court impermissibly imposed an omnibus sentence based on the language the court employed when it imposed sentence. *Id*. at ¶ 38. *See also State v. Summers*, 2014-Ohio-4538, 21 N.E.3d 632,

¶ 47 (3d Dist.) (distinguishing *Parker*). These cases are consistent with this court's jurisprudence where we have found that an improper purpose when imposing sentence may implicate an improper sentencing package. *See, e.g., State v. Collins*, 8th Dist. Cuyahoga Nos. 98575 and 98595, 2013-Ohio-938.

{¶ 42} The consideration of whether a court had an improper purpose in mind when reviewing whether a group of sentences constitutes an impermissible sentencing package may indicate that these courts are actually analyzing whether the sentencing court properly considered sentencing factors, including R.C. 2929.11, 2929.12, and 2929.14(C)(4), and not the sentencing-package doctrine as enunciated in *Saxon*. *Saxon* prohibits the revisitation of a group of sentences on remand from successful appeal when those sentences were affirmed on appeal. Only those sentences that were reversed on appeal may be considered by a trial court at resentencing. *Saxon* further prohibits the imposition of a "blanket" or omnibus sentence. Whether the holding in *Parker* truly addresses a pronouncement from *Saxon* does not need to be decided in this opinion because, even if this premise was true, the trial court in the present case did not express an improper purpose when imposing sentence.

{¶ 43} Unlike *Parker*, the trial court did not state an improper purpose when imposing sentence. The court also did not impose an omnibus sentence in violation of *Saxon*. Nothing about this situation impedes Newman's ability to have his sentences reviewed by an appellate court as Newman intimates in his application.

Therefore, Newman has not demonstrated a colorable claim of ineffective assistance of appellate counsel in this regard.

{¶ 44} Newman's application fails to set forth a colorable claim of ineffective assistance of appellate counsel. Therefore, the application is denied.

{¶ 45} Application denied.

RAYMOND C. HEADEN, JUDGE

EILEEN T. GALLAGHER, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR