[Cite as *State v. Ferrell*, 2015-Ohio-1446.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100659

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN FERRELL

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-574239-A
Application for Reopening
Motion No. 480056

RELEASE DATE: April 15, 2015

FOR APPELLANT

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MARY J. BOYLE, J.:

{¶1} John Ferrell has filed a timely application for reopening pursuant to App.R. 26(B) relating to *State v. Ferrell*, 8th Dist. Cuyahoga No. 100659, 2014-Ohio-4377, which affirmed his convictions for various sex offenses.[1] The state has opposed the application for reopening, and Ferrell has filed a reply. For the following reasons, we deny the application for reopening.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Ferrell must demonstrate that appellate counsel's performance was deficient and that, but for the deficient performance, the result of his appeal would have been different. *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456. Specifically, Ferrell must establish that "there is a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶3} In *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, 766 N.E.2d 588, the Supreme Court of Ohio held that:

> Moreover, to justify reopening his appeal, [applicant] "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d at 25, 1998-Ohio-704, 701 N.E.2d 696.

Smith, supra, at 7.

{¶4} In addition, the Supreme Court of Ohio, in *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, held that:

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[1]Ferrell's assignment of error that challenged the imposition of consecutive sentences was sustained, and the matter was remanded for resentencing.

> In *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458, we held that the two prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674, is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [Applicant] must prove that his counsel were deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a "reasonable probability" that he would have been successful. Thus [applicant] bears the burden of establishing that there was a "genuine issue" as to whether he has a "colorable claim" of ineffective assistance of counsel on appeal.

Id.

{¶5} It is also well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Jones, supra*, at 752; *State v. Gumm*, 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253; *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339.

{¶6} In *Strickland*, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be deferential. The court further stated that it is too tempting for a defendant-appellant to second-guess his attorney after conviction and appeal and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, "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." *Id*. at 689. Finally, the United States Supreme Court

has firmly established that appellate counsel possesses the sound discretion to decide which issues are the most fruitful arguments on appeal. Appellate counsel possesses the sound discretion to winnow out weaker arguments on appeal and to focus on one central issue or at most a few key issues. *Jones, supra*, at 752.

{¶7} Ferrell argues that his appellate counsel was ineffective for failing to raise two additional assignments of error. The first involves the testimony of Detective Dave Loading.

> Ferrell was denied effective assistance of appellate counsel when counsel failed to raise trial counsel's failure to object to improper opinion testimony by an expert witness, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article One, Section Ten of the Ohio Constitution.

{¶8} Ferrell identifies the following two experts from Det. Loading's trial testimony:

> A. Certainly not as long. But when I found that she was an active part of this case and I confirmed it, it was documented. I was ready to eventually pass the case on to the proper agency.
>
> Q. Tell us what you mean by passing it on to the proper agency.
>
> A. I initiated my work in this case because I wanted to make sure that it was proper jurisdiction, venue, that it really did happen. I did not want to pass it on to another jurisdiction just yet. Early on I had — it appeared that it could be Broadview Heights's case. I wanted to make sure I didn't pass it on before doing homework first. In my experience, there's nothing worse than passing on, finding out maybe it didn't belong there. So I did my homework prior to. When I found out that it was credible, that there was, you know, that it was really the jurisdiction of Broadview Heights, then I did pass it on.
>
> * * *

> Again, my position on this case was not the lead investigator. I wanted to make sure that it was a credible case. When I saw that it was and this number matched, then I was comfortable with passing it on to the other agency.

{¶9} There was no objection to this testimony. However, Ferrell contends the testimony was inadmissible and in violation of *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1120 (1989), and *State v. Stowers*, 81 Ohio St.3d 260, 1998-Ohio-632, 690 N.E.2d 881. In *Boston*, the court established that "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *Boston* at syllabus. Such testimony is presumptively prejudicial and inadmissible because it "'infringe[s] upon the role of the fact finder, who is charged with making determinations of veracity and credibility. * * * In our system of justice it is the fact finder, not the so-called expert or lay witnesses, who bears the burden of assessing the credibility and veracity of witnesses.'" *Id*. at 1240, quoting *State v. Eastham*, 39 Ohio St.3d 307, 312, 530 N.E.2d 409 (1988).

{¶10} In *Stowers*, the Ohio Supreme Court recognized a fine line between an expert offering an opinion as to the truth of a child's statement and "testimony which is additional support for the truth of the facts testified to by the child, or which assists the factfinder in assessing the child's veracity." *Stowers* at 262-263. Whereas, the first is strictly prohibited, testimony falling under the second category is allowed. In *Stowers*, the court addressed the admissibility of expert testimony that the behavior of the victims was consistent with behavior observed in sexually abused children. The court found that it was admissible and did not violate *Boston*; instead, the court concluded the expert's

testimony provided information to the jury that would allow it to make an "educated determination" regarding the ultimate issues in the case. Indeed, the court emphasized a distinction "between expert testimony that a child witness is telling the truth and evidence which bolsters a child's credibility insofar as it supports the prosecution's efforts to prove that the child has been abused." *Id*. at 262.

{¶11} Ferrell asserts that Det. Loading's statements served to improperly validate the victim's accusations. However, when the testimony is read in its proper context, it is evident that Det. Loading's statements were not related to the credibility of the victim's accusations but were offered to explain why the investigation was forwarded from North Royalton to Broadview Heights.

{¶12} In order to prevail on an ineffective assistance of counsel claim, Ferrell must demonstrate that counsel's performance fell below an objective standard of reasonable representation, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. If a claim can be disposed of by showing a lack of sufficient prejudice, there is no need to consider the first prong, i.e., whether trial counsel's performance was deficient. *Id*. at 142, citing *Strickland*, 466 U.S. at 695-696, 104 S.Ct. 2052, 80 L.Ed. 674. There is a general presumption that trial counsel's conduct is within the broad range of professional assistance. *Id*. at 142-143. Ferrell has not established a reasonable probability that this assignment of error would have been successful had it been raised by appellate counsel. Appellate counsel raised

five assignments of error, including a challenge based on improper venue, an issue that was raised and preserved throughout the trial record. Pursuant to *Jones*, appellate courts should not second-guess counsel's discretion to raise stronger arguments and focus on key issues as a sound strategy rather than asserting every conceivable issue on appeal. Ferrell has not satisfied his burden to merit reopening of the appeal based on the first assigned error.

{¶13} The second assignment of error that Ferrell contends his appellate counsel should have raised is that the trial court erred by allowing the social worker to testify about the sexual abuse investigation in violation of his due process rights. This argument requires a similar analysis of the law as the previous assigned error.

{¶14} Ferrell alleges that the following portions of the social worker's testimony violated his due process rights:

> A. Okay. Through our training, we are specially trained not to ask any type of leading questions. Basically how the interview starts out, you introduce yourself, explain your role and what your responsibility is, like to keep children safe. And then you spend some time just getting to know the child, like how old are you, do you go to school. Just basically what you like to do. There are many different tools we use to get the child to open up to us. [The victim] is older. She was 15 at the time, so she pretty much knew why I was there. I asked her, do you know why you're here today? And that's when she talked to me about what had happened.
>
> Q. Was she able to provide details to you about why she was there?
>
> A. Yes, she was. She was able to give explicit details to, you know, certain things that we look for in an interview to tell whether a child is, you know, has been coached because we've also been trained to identify if the child has been coached, led to say something, or if the child is just making it up to get themselves out of trouble.

[COUNSEL]: Objection.

THE COURT: Overruled.

A. There are things we look for to try to identify whether the child is being honest about what happened.

[COUNSEL]: Objection.

THE COURT: Overruled.

Q. Are those things you've learned in your training and your education?

A. Yes.

Q. During your interview with [the victim], did you detect any of those signs as warning signs that you're talking about?

A. No, I did not.

* * *

Q. Miss Cigoi, did you conduct any other interviews as it relates to this investigation?

A. I spoke with Holly Whalen multiple times about the situation because [the victim] was having problems. You know, it takes a little while to get the therapy in and she was having problems in school and adjusting.

Q. And other than that, did you take any other steps in this investigation?

A. Yes, I did get — did talk to Detective Strickler from Cleveland Sex Crimes and Detective Loading from North Royalton. I read through the interviews that were conducted at Cleveland Sex Crimes, the statement that was given in North Royalton, and all three statements were consistent with what she had told me when she was interviewed at Broadview Heights police station.

Q. And at the conclusion of your investigation, in all investigations, do you make any type of finding?

[COUNSEL]: Objection.

THE COURT: Overruled.

A. Yeah, we do — we make three types of findings. One is unsubstantiated, meaning there's no evidence that any sex abuse occurred. The second type of finding is indicated, meaning it's our professional opinion that sex abuse occurred, but we don't have enough evidence to substantiate it. Substantiations are really hard because we either need to have some type of medical evidence, a confession by the alleged perpetrator, or credible eyewitness testimony.

Q. So what was your finding in this case?

[COUNSEL]: Objection.

THE COURT: Overruled.

A. It was indicated.

{¶15} In *Stowers*, the Ohio Supreme Court held, "[a]n expert witness's testimony that the behavior of an alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible under the Ohio Rules of Evidence." *Stowers*, *supra*, at 261. This court has repeatedly recognized "that a social worker's interdepartmental determination of an allegation of abuse — such as, unsubstantiated, substantiated, or indicated — is acceptable, provided the social worker does not testify as to the truthfulness or credibility of the alleged victim." *State v. Jackson*, 8th Dist. Cuyahoga No. 92531, 2010-Ohio-3080, ¶ 17, citing *State v. Smelcer*, 89 Ohio App.3d 115, 623 N.E.2d 1219 (8th Dist.1993); *State v. Sopko*, 8th Dist. Cuyahoga No. 90743, 2009-Ohio-140; *State v. Whitfield*, 8th Dist. Cuyahoga No. 89570, 2008-Ohio-1090; *State v. Simpson*, 8th Dist. Cuyahoga No. 88301, 2007-Ohio-4301. In *Smelcer*, this court noted that "the *Boston* decision did not prohibit an expert from giving his or her opinion on

whether sexual abuse occurred." *Id*. at 121, citing *State v. Cornell*, 8th Dist. Cuyahoga No. 59365, 1991 Ohio App. LEXIS 5664 (Nov. 27, 1991).

{¶16} While the social worker's testimony reports the agency's finding that sexual abuse of the victim was indicated, it does not offer any opinions on who committed the abuse. At no point during the social worker's testimony did she testify that she believed Ferrell was the perpetrator or was the person who committed the abuse. The social worker testified repeatedly that her purpose in interviewing the victim was to assess his or her safety. In doing so, the social worker referred to the accused as the "alleged perpetrator."

{¶17} The social worker did not testify as to the veracity of the victim's accusations against Ferrell. Just as in *Smelcer*, the social worker in this case was not asked and she did not express any opinion about the victim's veracity. Instead, she testified about the interdepartmental determination regarding the allegation of abuse, which is permissible under the existing law. The case law that Ferrell relies upon is distinguishable either because it does not involve testimony regarding an interdepartmental determination or because the subject testimony involved medical expert opinions based solely on the victim's veracity. *E.g.*, *State v. Schewirey*, 7th Dist. Mahoning No. 05 MA 155, 2006-Ohio-7054, ¶ 45 (medical doctor's opinion of sexual abuse based solely on his assessment of the child's veracity is impermissible);[2] *State v.*

[2]*See also State v. Knight*, 8th Dist. Cuyahoga No. 87737, 2006-Ohio-6437; *State v. Winterich*, 8th Dist. Cuyahoga No. 89581, 2008-Ohio-1813; and *State v. West*, 8th Dist. Cuyahoga No. 90198, 2008-Ohio-5249. *Knight*, *Winterich*, and *West*

Pawlak, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175 (it was error to allow a witness to offer an opinion regarding the truth of the victim's accusations by asking the witness whether she believed the victim's allegations regarding the accused's inappropriate activity were true).

{¶18} Ferrell has not satisfied his burden of establishing a colorable claim of ineffective assistance of appellate counsel based on the errors he has presented for App.R. 26(B) review. Accordingly, his application for reopening is denied.

MARY J. BOYLE, JUDGE

EILEEN A. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR

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all involved testimony of a nurse-practitioner who based her opinion of probable sexual abuse on the veracity of the victim's testimony.