

[Cite as *State v. Brothers*, 2015-Ohio-2283.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100163

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEVIN BROTHERS

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case Nos. CR-12-561089 and CR-12-564362
Application for Reopening
Motion No. 479258

RELEASE DATE: June 9, 2015

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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LARRY A. JONES, SR., P.J.:

{¶1} Devin Brothers has filed a timely application to reopen his appeal in *State v. Brothers*, 8th Dist. Cuyahoga Nos. 100163 and 100164, 2014-Ohio-3132. In the consolidated appeals, this court affirmed the trial court’s judgment in Cuyahoga C.P. Nos. CR-12-564362 and CR-12-561089 where Brothers had been convicted and sentenced for multiple counts including, rape, kidnapping with sexually violent predator specifications, robbery, and firearm specifications. Brothers’s offenses involved multiple victims, including minors, and he received an aggregate prison sentence of 45 years to life.

{¶2} Brothers presents eight¹ assignments of error in which he alleges his appellate counsel was ineffective for various alleged reasons. The state has filed a brief in opposition to the application for reopening. For the reasons that follow, we deny the application for reopening.

{¶3} In *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696 (1998), the Supreme Court specified the proof required of an applicant as follows:

[T]he two-prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 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

¹Brothers’s application contains two assignments of error that are designated as the “seventh assignment of error.”

a “genuine issue” as to whether he has a “colorable claim” of ineffective assistance of counsel on appeal.

Id. at 25.

{¶4} First, Brothers argues his appellate counsel was ineffective for failing to have DNA tested with regard to victim A.W. It is his belief that DNA testing would have led to evidence that could have exonerated him. In particular, Brothers suggests that if A.W.’s husband is excluded as a contributor, that would have weakened the state’s case against him. Appellate counsel cannot add new evidence to the record in a direct appeal. Accordingly, even if appellate counsel had additional DNA testing performed at the appellate level, it could not have been considered by the court. *State v. Hill*, 90 Ohio St.3d 571, 740 N.E.2d 282 (2001); *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. To the extent Brothers is arguing that an error should have been raised asserting that trial counsel was ineffective for this reason, that argument is also without merit. Brothers is simply speculating that further DNA testing would have excluded A.W.’s husband as a contributor and that this fact would have been somehow favorable to him. This court has found that the decision to forego further DNA testing is a reasonable trial strategy. *State v. Foster*, 8th Dist. Cuyahoga No. 95209, 2012-Ohio-916, ¶ 13. Without definitive DNA proof, at least some doubt would remain as to the identity of the other contributor. The first proposed assignment of error does not provide grounds for reopening the appeal.

{¶5} Brothers contends that an assignment of error should have been raised alleging ineffective assistance of counsel for failure to call an expert witness. Brothers

provides no argument or reasoning to develop this argument beyond his general assertion that an expert would have shown that the state did not meet its burden of proof. The viability of this assigned error would require the court to either engage in speculation or rely on evidence that is outside of the record. The second proposed assigned error does not satisfy the criteria for reopening the appeal.

{¶6} The third proposed assigned error alleges that appellate counsel should have argued that Brothers's due process rights were violated by victim M.M.'s testimony. Brothers challenges M.M.'s testimony that she was a virgin based on the absence of blood, the duration of the incident, and the lack of tearing or scarring. Brothers concedes that M.M. identified him and his DNA was found on her, but he claims it was a consensual encounter. M.M. was walking to school that morning when the incident occurred. She was found crying in the bathroom, which led to police involvement and the eventual charges against appellant. This court has held,

[T]here is no requirement, statutory or otherwise, that a victim's testimony be corroborated as a condition precedent to a rape conviction. *State v. Sklenar*, 71 Ohio App.3d 444, 447, 594 N.E.2d 88 (9th Dist.1991), citing *State v. Gingell*, 7 Ohio App.3d 364, 365, 7 Ohio B. 464, 455 N.E.2d 1066 (1st Dist.1982); *State v. Love*, 49 Ohio App.3d 88, 91, 550 N.E.2d 951 (1st Dist.1988). "Sexual conduct" does not require proof of trauma. *State v. Barnes*, 1st Dist. Hamilton Nos. C-790595, C-790622, and C-790636, 1980 Ohio App. LEXIS 10250, *19 (Oct. 22, 1980). In other words, a physical injury is not a condition precedent to a conviction for rape; not all rape victims exhibit signs of physical injury. *State v. Flowers*, 10th Dist. Franklin No. 99AP-530, 2000 Ohio App. LEXIS 1933 (May 4, 2000), citing *State v. Van Buskirk*, 8th Dist. Cuyahoga No. 57800, 1994 Ohio App. LEXIS 4409 (Sept. 29, 1994).

State v. Taylor, 8th Dist. Cuyahoga No. 100315, 2014-Ohio-3134, ¶ 39. Based on the record, any argument that the evidence was insufficient or that Brothers's convictions were against the manifest weight of the evidence based on M.M.'s testimony would have been meritless, and counsel was not ineffective for failing to pursue this argument on appeal.

{¶7} In his fourth proposed assignment of error, Brothers asserts that appellate counsel should have challenged the robbery conviction involving B.W. for insufficiency of the evidence. Brothers believes that he could not be convicted of robbery beyond a reasonable doubt unless the state proved that a theft occurred. This is incorrect. Brothers was convicted of robbery in violation of R.C. 2911.02(A)(2) that requires proof that he inflicted, attempted to inflict, or threatened to inflict physical harm on B.W. while *attempting* to commit or committing a theft offense. The elements of robbery as set forth in R.C. 2911.02(A)(2) do not require the state to prove a theft was actually accomplished. This argument does not warrant reopening of the appeal.

{¶8} Brothers next contends that appellate counsel should have raised an assignment of error based on the admission of Ms. Johnson's testimony and B.W.'s testimony, which he believes constituted improper hearsay. Brothers does not identify any specific testimony by Ms. Johnson and, therefore, has failed to establish the admission of any improper hearsay with respect to her testimony. He contends B.W.'s testimony made him "look like his sister's attacker by testifying to a fight" and this was

prejudicial. Brothers has not established that this testimony was inadmissible hearsay and a review of the record reflects that it was not.

{¶9} The prosecutor specifically told B.W., “I want you to be careful because you can’t talk about what somebody else told you.” B.W. then testified that he spoke to his sister and went looking for somebody that fit the description of the attacker. When B.W. approached the man who he believed matched the description, they fought. B.W. never testified specifically about what his sister had told him. The jury was aware that B.W. had not witnessed the incident between his sister and the perpetrator. The fifth assignment of error does not satisfy the burden for reopening the appeal.

{¶10} Brothers argues that his appellate counsel was ineffective for failing to challenge the impartiality of the trial judge on appeal. Brothers appears to be arguing that the trial judge was biased against him because he was also presiding over, or was at least aware, that Brothers’s father was “fighting” a sex crime. There is no evidence in the record to support this contention of judicial bias and appellate counsel was not ineffective for failing to raise it on appeal. *See In re L.S.*, 152 Ohio App.3d 500, 2003-Ohio-2045, 788 N.E.2d 696, ¶ 53 (8th Dist.), citing, Section 5(C), Article IV, Ohio Constitution; R.C. 2701.03, (“it is the Chief Justice of the Ohio Supreme Court or his designee that has exclusive jurisdiction to disqualify a common pleas judge on the grounds of bias or prejudice”). This sixth assignment of error does not merit reopening.

{¶11} In his final assignments of error, Brothers contends his appellate counsel was ineffective for failing to show that the state failed to prove him guilty beyond a

reasonable doubt, by not challenging the alleged admission of hearsay, by not challenging the impartiality of the trial judge, and for failing to request a downward departure at sentencing based on the federal sentencing guidelines. Brothers does not present any citations to the record in support of these arguments and several are redundant of arguments previously addressed. He has not established a colorable claim of ineffective assistance of appellate counsel. Further, the federal sentencing guidelines do not apply to his sentence imposed under Ohio law.

{¶12} The application for reopening is denied.

LARRY A. JONES, SR., PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR

#100163

KEYWORDS: App.R. 26(B), ineffective assistance, outside the record, burden. Application for reopening denied where applicant does not satisfy standard for establishing ineffective assistance of appellate counsel pursuant to App.R. 26(B). Applicant did not establish ineffective assistance of appellate counsel where he did not establish prejudice from the alleged deficiencies in representation. Effectiveness of appellate counsel cannot be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material. The court did not improperly admit hearsay evidence and the federal sentencing guidelines do not apply to sentences imposed pursuant to Ohio law.