

[Cite as *State v. Worley*, 2017-Ohio-649.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103105

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PEREZ WORLEY

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-587709-B
Application for Reopening
Motion No. 498399

RELEASE DATE: February 17, 2017

FOR APPELLANT

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SEAN C. GALLAGHER, J.:

{¶1} Under App.R. 26(B), defendant-appellant, Perez Worley, seeks to reopen his appeal in *State v. Worley*, 8th Dist. Cuyahoga No. 103105, 2016-Ohio-2722, which affirmed his conviction for aggravated murder, with an associated firearm specification, and his indefinite, aggregate sentence of 28 years to life in prison. For the reasons that follow, we deny the application to reopen.

{¶2} Initially, we note that Worley's application is procedurally defective. The application exceeds the ten-page limitation set forth by App.R. 26(B)(4). This procedural defect provides sufficient grounds for dismissing the application for reopening. *State v. Harris*, 8th Dist. Cuyahoga No. 94388, 2011-Ohio-194, *reopening disallowed*, 2011-Ohio-4403, ¶ 2. Additionally, Worley failed to attach a sworn statement as required under App.R. 26(B)(2)(d). The sworn statement is mandatory, and the failure to include one warrants denial of the application. *State v. Lechner*, 72 Ohio St.3d 374, 650 N.E.2d 449 (1995); *see also State v. Bates*, 8th Dist. Cuyahoga Nos. 97631, 97632, 97633, and 97634, 2012-Ohio-3949, *reopening disallowed*, 2015-Ohio-4176 (applying *Lechner* and recognizing that the sworn statement is mandatory).

{¶3} Apart from the procedural defects in Worley's application, Worley's five proposed assignments of error fail on the merits. He fails to demonstrate "a genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal" as required under App.R. 26(B)(5).

{¶4} The appropriate standard to determine whether a defendant has received ineffective assistance of appellate counsel is the two-pronged analysis found in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10. Applicant “must prove that his counsel [was] deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal.” *State v. Sheppard*, 91 Ohio St.3d 329, 330, 744 N.E.2d 770 (2001), citing *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. 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 24, 25, 701 N.E.2d 696 (1998). Appellate counsel is not required to raise and argue assignments of error that are meritless, nor is counsel ineffective for not raising every conceivable assignment of error. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253 (1995).

{¶5} In his first proposed assignment of error, Worley challenges the trial court’s failure to give an instruction on accomplice testimony as required by R.C. 2923.03(D) and contends that such failure constitutes plain error. Plain error does not exist, however, if (1) the accomplice’s testimony was corroborated by other evidence introduced at trial, (2) the jury was aware from the accomplice’s testimony that he benefitted from agreeing to testify against the defendant; and/or (3) the jury was instructed generally regarding its

duty to evaluate the credibility of the witnesses. *State v. Woodson*, 10th Dist. Franklin No. 03AP-736, 2004-Ohio-5713, ¶ 18; *State v. Jackson*, 2d Dist. Greene No. 2009 CA 21, 2010-Ohio-1127, ¶ 17. When these factors are present, it simply cannot be said that the absence of the accomplice instruction affected the outcome of the trial. *Woodson* at ¶ 19-20; *see also State v. Ross*, 8th Dist. Cuyahoga No. 98764, 2013-Ohio-3130, ¶ 39-40 (failure to provide cautionary instruction was harmless error where the other evidence independent of codefendant's testimony was overwhelming and jury was aware of codefendant's self-interest and bias in testifying for the state).

{¶6} All three of these factors apply in this case and therefore plain error does not exist. The record reflects that several witnesses circumstantially identified Worley as the shooter and that another witness familiar with Worley saw him actually shoot the victim. Thus, the state produced significant evidence apart from the codefendant's testimony that supported the conviction. Further, the trial court provided the standard instructions to the jury regarding their duty to evaluate the credibility of the witnesses, and the jury was aware that the codefendant received a favorable plea agreement in exchange for his testimony at trial.

{¶7} Next, Worley contends that his appellate counsel was ineffective in failing to raise a prosecutorial misconduct assignment of error based on the prosecutor allegedly providing an inaccurate summary of the evidence during closing arguments and eliciting speculative testimony from witnesses. But our review of the record does not support Worley's claim. Nor does Worley demonstrate any prejudice from these alleged

instances of misconduct. He therefore fails to establish a reasonable probability that the outcome of the appeal would have been different had this assignment of error been raised.

{¶8} In his third proposed assignment of error, Worley argues that his appellate counsel should have raised an additional argument in support of the ineffective assistance of trial counsel claim in his direct appeal. According to Worley, his trial counsel was ineffective in failing to offer evidence that the victim refused to testify against him in a 2009 criminal case, which directly contradicted the state's theory of Worley's motive for shooting the victim. But the decision not to introduce this alleged evidence, which would have opened the door as to the specifics concerning Worley's prior criminal case, was a matter of trial strategy that we will not second-guess. *State v. Littlejohn*, 8th Dist. Cuyahoga No. 95480, 2001-Ohio-2035, *reopening disallowed*, 2012-Ohio-1064, ¶ 8, citing *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270. Worley has failed to demonstrate any prejudice that resulted from the trial counsel's strategic decision not to introduce this evidence or that the outcome of his appeal would have been different had this issue been raised on appeal.¹

{¶9} In his fourth proposed assignment of error, Worley contends that appellate counsel should have argued that the trial court abused its discretion in denying Worley's motion for a continuance of the trial to allow his newly retained counsel to get "up to

¹We further note that this evidence would not have directly contradicted the state's evidence as to motive. Testimony at trial established that Worley harbored animosity against the victim because he believed that the victim had "snitched." The fact that the victim never testified against Worley would not have disproved this testimony.

speed.” The record reflects, however, that the trial court exercised its sound judgment by denying the request, which would have unnecessarily delayed the proceedings. Further, Worley’s two appointed attorneys continued to represent him during the trial, providing effective assistance of counsel. Worley cannot demonstrate any prejudice by the trial court’s decision to deny his request for a continuance and consequently fails to set forth a colorable claim of ineffective assistance of appellate counsel. *State v. Schwarzman*, 8th Dist. Cuyahoga No. 100337, 2014-Ohio-2393, *reopening disallowed*, 2015-Ohio-516, ¶ 14.

{¶10} In his fifth proposed assignment of error, Worley argues that the trial court abused its discretion in failing to honor his mother’s right to “plead the Fifth” and to avoid testifying because she had not been properly served with a subpoena. Aside from the record reflecting that the prosecutor had served Worley’s mother with a subpoena, mother’s stated reasoning for invoking her Fifth Amendment privilege did not involve a concern of self-incrimination. *See State v. Arnold*, 147 Ohio St.3d 138, 2016-Ohio-1595, 62 N.E.3d 153, ¶ 43 (recognizing that the cloak of the Fifth Amendment applies only when the danger of self-incrimination is “real and appreciable”). Moreover, this court has previously recognized that an appellant lacks standing to challenge the trial court’s actions regarding another person’s assertion of his Fifth Amendment privilege against self-incrimination since that privilege is personal in nature. *State v. Ramjit*, 8th Dist. Cuyahoga No. 77337, 2001 Ohio App. LEXIS 562 (Feb. 15, 2001). As there were simply no grounds for Worley’s mother to refuse to

testify, appellate counsel was not ineffective in refraining from raising a meritless assignment of error.

{¶11} In his final proposed assignment of error, Worley argues that the cumulative effect of all the aforementioned errors deprived him of a fair trial. But having found no merit to his proposed assignments of error, we summarily reject his cumulative error argument.

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

SEAN C. GALLAGHER, JUDGE

EILEEN T. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR