[Cite as *State v. Butts*, 2020-Ohio-5011.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108381
v.	:	
TAMIR H. BUTTS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: October 20, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-17-622310-A
Application for Reopening
Motion No. 539979

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Mary M. Frey, Assistant Prosecuting Attorney, *for appellee*.

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

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Applicant, Tamir H. Butts, timely seeks to reopen his appeal in *State v. Butts*, 8th Dist. Cuyahoga No. 108381, 2020-Ohio-1498. Butts, through counsel,

presents the following two proposed assignments of error:

> I. The trial court erred in refusing to allow trial counsel to cross-examine the lead detective on statements she previously attested to in an affidavit to a search warrant.
>
> II. The trial court erred in interpreting and applying Criminal Rules 16(D) and 16(E) depriving Appellant of a fair trial.

After a thorough review of the record and law, this court denies the application to reopen.

I. Factual and Procedural History

{¶ 2} Appellant was convicted of crimes related to the sexual abuse of K.R. Testimony adduced at trial established that these incidents began when K.R. was seven years old and continued until K.R. was nine years old, when the relationship appellant had with K.R.'s mother ended. In 2017, K.R. told her mother that appellant had sexually abused her. A criminal investigation ensued. This culminated in a 16-count indictment charging appellant with various crimes, including rape of a child under the age of 13. Appellant was found guilty of numerous counts of rape, kidnapping, gross sexual imposition, and child endangerment. He was sentenced to an aggregate prison term of life in prison with parole eligibility after serving 25 years.

{¶ 3} He appealed his convictions to this court, assigning the following errors:

I. The trial court erred by permitting a state expert to testify to matter[s] that were both beyond her expertise and unfairly prejudicial as the jury was likely to misuse the information as a substitute for substantive evidence.

II. The trial court erred in the sentencing procedure as [the trial court] failed to consider a sentencing option of life with parole eligibility after fifteen years pursuant to R.C. 2971.03(B)(1)([c]).

{¶ 4} On April 16, 2020, this court overruled these two assignments of error and affirmed appellant's convictions and sentences.

{¶ 5} On July 15, 2020, appellant, through counsel, timely filed an application to reopen his appeal asserted the two proposed assignments of error set forth above. The state timely opposed the motion.

II. Law and Analysis

A. Standards for Reopening

{¶ 6} An appellant in a criminal matter may apply to reopen an appeal based on a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1). A claim of ineffective assistance of appellate counsel is judged using the test for ineffective assistance of trial counsel found in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This is the appropriate standard to assess whether appellate counsel was ineffective under App.R. 26(B)(5). *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456 (1996). The applicant "must prove that his counsel [was] deficient for failing to raise the issue 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." *State v. Spivey*, 84 Ohio St.3d 24,

25, 701 N.E.2d 696 (1998). To prevail on an application to reopen, defendant must demonstrate "a colorable claim" of ineffective assistance of appellate counsel.

B. Prior Statement Used for Purposes of Cross-examination

{¶ 7} Appellant claims that the trial court improperly precluded the cross-examination of a witness using a prior statement. Appellant argues that he should have been allowed to cross-examine a detective about averments that were made in a search warrant affidavit. He does not cite to a rule of evidence that would allow questioning about an out-of-court statement, so this court will assume counsel is relying on Evid.R. 613, titled, "impeachment by self-contradiction," or Evid.R. 616(C), impeachment by specific contradiction.

{¶ 8} Evid.R. 613 allows the impeachment of a witness using a prior statement or conduct. Evid.R. 616 allows impeachment using facts contradicting a witness's testimony, but limits the admittance of extrinsic evidence. "'[T]he trial court has broad discretion in the admission of evidence, and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should not disturb the decision of the trial court.'" *State v. Barnes*, 94 Ohio St.3d 21, 23, 759 N.E.2d 1240 (2002), quoting *State v. Issa*, 93 Ohio St.3d 49, 64, 752 N.E.2d 904 (2001). Further, "The admission of prior inconsistent statements that are collateral to the issue being tried and that relate only to the credibility of a witness is a matter within the court's wide discretion." *State v. Williams*, 3d Dist. Allen No. 1-99-86, 2000 Ohio App. LEXIS 2395, 20 (June 6, 2000), citing *State v. Shaffer*, 114 Ohio App.3d 97, 102, 682 N.E.2d 1040 (3d

Dist.1996). An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Where there is competent, credible evidence in the record to support the trial court's decision, there is no abuse of discretion. *Trolli v. Trolli*, 8th Dist. Cuyahoga No. 101980, 2015-Ohio-4487, ¶ 29, citing *Kapadia v. Kapadia*, 8th Dist. Cuyahoga No. 94456, 2011-Ohio-2255, ¶ 24.

{¶ 9} The trial court allowed several questions during cross-examination regarding the warrant and attached affidavit. However, after the state objected, the following exchange occurred and arguments were made to the bench outside of the hearing of the jury.

> The court: You're asking questions on the affidavit that is in a search warrant that has been presented to a judge that's been verified and signed for probable cause.
>
> [Defense counsel]: But here is the issue. In this affidavit she indicates that — That the issue was [the victim's] negative attitude about [appellant], not about [the mother's boyfriend], about [appellant]. That is not what anybody testified to. That's all I'm asking for. She swore to it. She signed her name to it.
>
> [Prosecutor]: My response, number one, that's a clear typographical error. Number two, that's why I wanted to come up before. She should not be attacking the affidavit at this point in the trial.
>
> [Defense counsel]: I'm just asking is that correct, did you sign your name to something that's not correct.

(Tr. 1023.)

{¶ 10} The arguments made in the application indirectly contradict these statements made by defense counsel at trial: "Notably, the discrepancy is one that

falsely painted [appellant] in a bad light and would have been advantageous to the detective in obtaining a search warrant, after already having failed once at obtaining an arrest warrant." The implication is that appellant is attacking the validity of the search warrant in a venue other than a suppression hearing. This is precisely what the trial court was attempting to avoid:

> [Defense counsel]: I'm just asking is that correct, did you sign your name to something that's not correct.
>
> The court: No. I'm not letting you go there. We're moving on. I'm not letting you attack anything in the affidavit.
>
> If you thought there was a clear misstatement or inaccuracy in the affidavit, we could have had a suppression hearing. We could have had a *Frank*'s hearing. We could have had anything.
>
> [Defense counsel]: I'm not saying that it was necessarily —
>
> The court: But now you're asking her. You said it was [appellant], and now that's not — I mean, that's clearly you're going to the credibility of the witness who signed as the affiant to that which is not — this is not the forum to attack her statement in an affidavit on a search warrant, so I'm not going to let you do that.
>
> [Defense counsel]: I understand what you're saying.
>
> The court: All right.
>
> [Defense counsel]: I think there is a differential between them.
>
> The court: You know if you — look it.
>
> [Defense counsel]: That's fine. I understand what you're saying, but what I'm saying, I'm not saying it's invalid.

(Tr. 1024-1025.)

{¶ 11} Assuming that the use of the statements made in the affidavit were for the purpose of attacking the credibility of the witness using a prior inconsistent statement, this court will assume for the sake of argument that appellant should have been allowed to question the witness about the statements made in the affidavit, and lay a proper foundation for its use to attempt to attack the credibility of Detective Jennifer Kroczak. *See generally State v. Sharpless*, 11th Dist. Portage No. 97-P-0065, 1998 Ohio App. LEXIS 6162, 27-28 (Dec. 18, 1998) (finding that a search warrant affidavit was admissible evidence at trial under Evid.R. 616, but the court's refusal to allow questioning about it was harmless error). Any error was harmless.

{¶ 12} Civ.R. 61 states,

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

{¶ 13} Here, the warrant affidavit contains a minor error in a statement made by the victim that was otherwise correct. Detective Kroczak testified consistent with this being a typographical error in the affidavit, as argued by the state. (Tr. 974.) All the testimony adduced at trial was consistent on this point.

{¶ 14} Further, defense counsel's stated purpose at trial was to show a contradiction in the affidavit to the detective's testimony at trial — to show a

contradiction that is easily explained. This does not seriously undermine the credibility of the detective, undermine the investigation, or cast doubt on the integrity of the convictions in this case.

{¶ 15} In his application appellant claims he was "severely prejudiced" by this claimed error. He asserts that "questioning regarding this factual discrepancy also would have illustrated the investigative bias present throughout the process." Appellant cites to no other claimed instance of investigative bias to demonstrated that such existed throughout the investigative process, as alleged. Nor does a review of the record reveal such a bias.

{¶ 16} Appellate counsel is generally given a great deal of discretion in deciding which issues to raise in an appeal and to winnow out those issues that offer a diminished chance of success. *State v. Allen*, 77 Ohio St.3d 172, 173, 672 N.E.2d 638 (1996), quoting *State v. Campbell*, 69 Ohio St.3d 38, 53, 630 N.E.2d 339 (1994), quoting *Jones v. Barnes*, 463 U.S. 745, 753, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

{¶ 17} We are asked in this application to determine whether this alleged error presents a colorable claim of ineffective assistance of counsel. However, not every error at trial presents such a claim. Errors at trial are bound to occur, but only prejudicial errors should result in reopening. The Supreme Court and the Supreme Court of Ohio has recognized this when incorporating a prejudice component to the test for ineffective assistance of counsel and appellate counsel.

{¶ 18} Here, the error complained of is slight given the specified purpose of defense counsel in attempting to question the detective about the statement. In the

face of overwhelming evidence of appellant's guilt, this claimed error does not present a case where there is even a slight possibility of a different outcome, let alone a reasonable one.

C. Discovery Violation

{¶ 19} Appellant also claims that appellate counsel was ineffective for not assigning an error challenging the trial court's interpretation of Crim.R. 16. Specifically, appellant claims that the trial court erred in applying Crim.R. 16(E) and 16(D).

{¶ 20} "[P]rosecutorial violations of Crim.R. 16 result in reversible error only when there is a showing that (1) the prosecution's failure to disclose was willful, (2) disclosure of the information prior to trial would have aided the accused's defense, and (3) the accused suffered prejudice." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 131, citing *State v. Parson*, 6 Ohio St.3d 442, 445, 453 N.E.2d 689 (1983).

{¶ 21} Under Crim.R. 16(B), the state has an obligation to

> provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:
>
> * * *
>
> (3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;

> (4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests * * *.

{¶ 22} In cases of sexual assault, Crim.R. 16(E) provides a right of inspection, but also balances that right with a victim's right to privacy. It provides,

> [D]efense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

{¶ 23} This rule specifically states that medical records unrelated to the allegations of sexual assault are not subject to inspection or disclosure.

{¶ 24} Appellant argues that Crim.R. 16(D) places an obligation on the state to turn over relevant evidence or at least disclose the existence of these records and a reason for nondisclosure. However, this rule only applies to material that is otherwise subject to disclosure. It states in part, "The prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material *otherwise subject to disclosure* under this rule for one or more of the following reasons * * *." (Emphasis added.) Crim.R. 16(D). Crim.R. 16(E)(1) specifically exempts medical records unrelated to the indictment from disclosure. Therefore, in the absence of an order to do otherwise, the state would not violate Crim.R. 16(D) by not turning over medical records if the records were unrelated to

the allegations of sexual assault in the case because they would not be subject to disclosure. *But see State v. Woods*, 4th Dist. Ross No. 13CA3396, 2014-Ohio-4429 (holding that the failure to comply with an order of the court to produce medical records of an underage victim of sexual assault for in camera inspection constituted a discovery violation).

{¶ 25} The instances of sexual conduct charged in the indictment were alleged to have occurred between 2008 and 2011. The medical records that appellant claims are relevant to the case were from a routine pediatric appointment that occurred in 2018, which was unrelated to the allegations of sexual abuse that occurred in this case. The trial court reviewed the records in camera and determined that they were not related to the allegations of sexual abuse that were the subject of the indictment. The trial court also found that the records were not relevant to the case. The trial record and appellant's arguments in the application do not indicate that this decision was in error. The state's late disclosure that these records were in its possession was discussed at a hearing, and the defense's objection was noted. However, the trial court's in camera review of the records resulted in a determination that the records were not relevant. Any claimed prejudice as a result of the late disclosure is contradicted by this finding. This decision of the trial court also confirms that the records were not subject to disclosure pursuant to Crim.R. 16. Appellant's bare speculation that other records must exist that the state failed to turn over is further contradicted by the record. During the hearing, the state informed the court that these were the only medical records in its possession.

{¶ 26} Under similar circumstances, this court previously held that the failure to disclose medical records unrelated to a sexual assault that occurred in that case did not result in a discovery violation. *State v. Brown*, 8th Dist. Cuyahoga No. 86544, 2006-Ohio-2573, ¶ 54-57. There, a victim was being treated in a hospital for a drug overdose and disclosed to hospital staff that she had been raped four months ago. This prompted a report to police, an investigation, and charges. We held that on "careful consideration of the record of proceedings in this case and the law, we conclude that the State did not fail to provide discovery information required under Crim.R. 16(B)(1)(d)." *Id*. at ¶ 54. The court explained that only records pertaining to the charged case were subject to discovery, and "[t]he documents in question clearly were the result of a treatment for a drug overdose. The State indicated that although [the victim] disclosed that she was raped four months earlier, she was not treated for the rape." *Id*. Just like in the present case, no sexual assault examination was performed, and the state did not present any medical evidence related to the sexual assault that was derived from this medical treatment. *Id*. at ¶ 55.

{¶ 27} While this case predates the 2010 enactment of the open discovery rules currently enshrined in Crim.R. 16, the privacy protections afforded a victim of sexual assault in Crim.R. 16(E), which did not exist at the time, provide further protections that were not analyzed in *Brown*. If anything, the nondisclosure of unrelated medical records pertaining to a victim of sexual assault are better protected now than when *Brown* was decided, and are in line with past decisions

protecting the privacy of victims of sexual assault. *See, e.g., State v. Donnal*, 3d Dist. Allen No. 1-06-31, 2007-Ohio-1632.

{¶ 28} The trial court reviewed the records in camera and determined that they were not relevant, thereby also establishing that they were not subject to disclosure. Nothing appellant presents in the application could lead to the conclusion that appellate counsel was ineffective for failing to advance this issue on appeal.

{¶ 29} Application denied.

FRANK D. CELEBREZZE, JR., JUDGE

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