[Cite as *State v. Kegg*, 2025-Ohio-2651.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
	:	Case No. 23CA16
Plaintiff-Appellee,	:	
	:	
v.	:	DECISION AND JUDGMENT
	:	ENTRY
MARCUS JACYLYN KEGG,	:	
	:	**RELEASED: 07/17/2025**
Defendant-Appellant.	:	

APPEARANCES:

Keller J. Blackburn, Athens County Prosecuting Attorney, and Elizabeth L. Pepper, Assistant Athens Prosecuting Attorney, Athens, Ohio, for appellee.

Katherine Memsic, Soroka & Associates, L.L.C., Columbus, Ohio, for appellant.

Wilkin, J.

{¶1} This is an appeal from an Athens County Court of Common Pleas judgment entry convicting Marcus Jacylyn Kegg ("Kegg") of rape in violation of R.C. 2907.02(A)(2) a first-degree felony.

{¶2} Kegg asserts four assignments of error on appeal. In his first assignment of error, Kegg asserts that the trial court erred when it failed to hold a *Daubert* hearing and subsequently admitted Heather Mitchell as an expert witness. We find that the trial court properly determined that Mitchell's testimony regarding victim behavior was beyond the common knowledge of a layperson, and that Mitchell was qualified to testify based on her special knowledge and experience. Therefore, we find that the court did not abuse its discretion and overrule Kegg's first assignment of error.

{¶3} In his second assignment of error, Kegg asserts that the trial court erred when it failed to excuse Juror Four, which deprived him of a fair trial. We find that the trial court acted within its discretion by retaining Juror Four, based on her assurances of impartiality. Further, Kegg's failure to challenge the juror for cause supports the conclusion that the trial court did not err in its decision. Thus, we overrule Kegg's second assignment of error.

{¶4} In his third assignment of error, Kegg asserts that he was denied effective assistance of counsel. Because we find his trial counsel's representation was not deficient and therefore did not prejudice Kegg, his trial counsel was not ineffective. Accordingly, we overrule Kegg's third assignment of error.

{¶5} In his fourth assignment of error, Kegg asserts that the trial court abused its discretion when it denied his motion for a new trial. Because we find that there was no irregularity in Kegg's trial due to ineffective representation, we find no abuse of discretion and overrule Kegg's fourth assignment of error.

{¶6} Having overruled all four of Kegg's assignments of error, we affirm his conviction.

FACTS AND PROCEDURAL BACKGROUND

{¶7} On March 7, 2022, a grand jury indicted Kegg on one count of rape in violation of R.C. 2907.02(A)(2), a first-degree felony. Kegg pleaded not guilty. The State's bill of particulars alleged that on November 17, 2017, Kegg "purposely compelled E.K. to submit by force or threat of force" to engage in "sexual conduct" with him.

{¶8} On May 24, 2023, the State moved to amend the indictment to change the offense date to November 16, 2017, which was granted.

{¶9} On May 24, 2023, Kegg filed a motion to exclude the testimony of Heather Mitchell as an expert witness for the State regarding delayed disclosures of sexual assaults to the authorities. Kegg alleged that Mitchell lacked qualifications as an expert in delayed disclosures. Her background and training were in social work and counseling, not delayed disclosures. Kegg also alleged that Mitchell had never been qualified as an expert by any Ohio court.

{¶10} The State filed a motion in opposition that maintained that Mitchell was qualified because she had experience working in the field of victim behavior, including delayed disclosure.

{¶11} The court overruled Kegg's motion to exclude Mitchell from providing expert witness testimony for the State.

{¶12} Prior to the start of trial, the court asked "was there any offer relayed in this case?" The State informed the court that a plea was offered to Kegg. The court requested the parties place the offer and Kegg's response on the record. The judge explained to Kegg that "the State has offered in exchange for a plea up to this point, they would make, that they would make a certain kind of sentencing recommendation to the Court. You are certainly within your rights entirely to decline that offer and exercise your Trial rights today as we, as you intend to do. However, I just want to make sure that the Record, the recording, here reflects what that offer was." The judge then removed himself from earshot

further explaining that if he did eventually need to impose sentence on Kegg in his case, he would not be privy to any recommended sentence.

{¶13} After the judge excused himself, the prosecutor asked the assistant prosecutor to put on the record the plea that had been offered to Kegg. The assistant prosecutor stated:

> The offer from the State was to amend the one count to felonious assault, have the defendant plead guilty to the amended count. In exchange there would be a recommended . . . a four-year sentence with an additional agreement to judicial release after six months prison time pending a favorable institutional summary report. That was denied in text message by [Kegg's counsel].

In response, defense counsel stated: "That was communicated, this is [Kegg's counsel], that was communicated to [Kegg] and [he] has never given me authority to negotiate. It was communicated to him and expressly rejected by him."

{¶14} The State presented eight witnesses. Pertinent to this appeal are the testimonies of the victim, E.K., and Heather Mitchell, which are detailed below.

{¶15} E.K. testified that on November 16th or 17th, 2017, Kegg forcibly raped her, and ejaculated inside her. However, E.K. testified that she did not report the rape at that time because she lacked a good support system, didn't want it to affect her graduation, and, finally, she did not consider herself a victim.

{¶16} E.K. testified that several years after the rape, in May of 2021, E.K. saw Kegg in a bar which caused her to become very upset to the extent that she confronted him and was kicked out of the bar. And, after conferring with her

family, she decided to reenter therapy and to file a complaint. In May 2021, E.K. contacted the Athens Police Department.

{¶17} The State then called to testify, Heather Mitchell, who was employed by the Survivor Advocacy Outreach Program as a supervisor who coordinates the program's crisis advocacy. Mitchell testified that she has a bachelor's and master's degree in social work. After graduating college, she was employed at the International Institute of New Jersey where she counseled survivors of trauma. In December of 2016, she started working for the Survivor Advocacy Outreach program as a volunteer coordinator. Her job was to train volunteers about sexual and domestic violence advocacy. She also did a lot of direct advocacy for survivors by taking their calls on the crisis hotline, as well as going to the hospital with them. Mitchell told the jury that she undergoes 30 hours of training every two years for her "professional licensure" and "advocate role[.]" She testified over her career she worked with at least 1,000 sexual assault victims. She maintained that her testimony would be based on her experience working with sexual assault victims. The State then asked the court to qualify Mitchell as an expert in the field of victim behavior, to which, defense counsel renewed his objection. The court overruled Kegg's objection and certified Mitchell as an expert witness.

{¶18} Mitchell testified that victims of sexual assault react in different ways. It is very personal. She also stated that trauma plays a role in a victim's response. After experiencing trauma, the person may have different responses, including fighting, fleeing, freezing, or trying to cooperate with the attacker.

Mitchell testified that when a victim talks about their experience varies. Some may have a lot to say "up front[,]" but most victims that she had worked with discussion of the trauma "has come later."

{¶19} The State asked Mitchell if she could "talk to the jurors about some of the reasons why a victim of sexual assault wouldn't necessarily just run to the police station and report it right away." Mitchell testified:

> For sure. So there are a lot of reasons. Some of the main ones think people have a really strong fear of not being believed. Uh, they have a fear of retribution uh, if they tell people that there gonna, you know, have their uh, they are going to be physically attacked or come after in some other way. Uh, I think that a lot of people really don't want to identify as a victim. They didn't ask for this experience to happen to them. And uh, really don't want to have to take that story on. Uh, I think people are scared of the criminal justice process. They don't or they don't even know what the options are. What the time lines are. That kind of thing.

The State asked Mitchell if there were reasons that in particular a college student might not immediately report a sexual assault. Mitchell testified:

> Yea. I think what I have seen primarily with college students is. Number one, they are in a small campus community. They may not want other people to know what happened. They may be experiencing, you know seeing the person that committed the assault around and kind of not wanting other people to, to know about that dynamic. They may also just be really pre-occupied with what they are there to do in college which is get through with classes, graduate, finish up an internship. Work a side job to make ends meet. A lot of people, I think especially in that situation and it does not translate to other life situations but just really put the assault like on the back burner. Get through college, focus. Not let it disrupt the path that they have put themselves on. Uh, I would say that's pretty common.

The prosecutor asked if delayed reporting of sexual assault was "[m]ore common than not?" Mitchell responded: "[I]n my experience yes."

{¶20} The court then had a lunch break. Over the break, Juror Four informed the court that she knew Mitchell. After the break, with only the judge and counsel in the courtroom, the judge asked Juror Four about her relationship with Mitchell. Juror Four divulged that she and Mitchell had some common friends and they got together on occasion, but she had not seen Mitchell for over a year. Therefore, she said that she had not discussed the case with Mitchell. After the court conducted a voir dire of Juror Four, the court asked counsel whether they were comfortable keeping Juror Four on the jury. They had no objections, so Juror Four was not removed.

{¶21} The defense presented a single witness, the defendant, Kegg. Kegg did not deny having sex with E.K., but rather stated that it was consensual. With the completion of Kegg's testimony, the defense rested.

{¶22} The jury found Kegg guilty of rape and was sentenced to eight years in prison with five years of post-release control.

{¶23} Kegg filed a motion for new trial pursuant to Crim.R. 33, asserting two "irregularities" that caused his trial to be unfair. The first was that the trial court abused its discretion in permitting Mitchell to be an expert witness for the State and testify that sexual abuse victims often delay reporting these offenses to authorities. The second was that Kegg's trial counsel was ineffective because he failed to communicate a plea offer to his client before he rejected it, and then subsequently communicating to Kegg an incorrect plea offer.

{¶24} The State filed a motion contra arguing that delayed reporting is a proper subject for expert testimony, and, its witness, Mitchell, was qualified to

testify about delayed disclosure. The State also argued that Kegg did not establish that his trial counsel's representation was deficient or that he suffered any prejudice.

{¶25} The trial court issued a one-page decision that denied Kegg's motion for a new trial. Following this denial, Kegg timely appealed his rape conviction.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED WHEN IT FAILED TO HOLD A DAUBERT HEARING AND SUBSEQUENTLY ADMITTED HEATHER MITCHELL AS AN EXPERT WITNESS.

II. THE TRIAL COURT ERRED WHEN IT FAILED TO EXCUSE JUROR FOUR FROM THE JURY AND DEPRIVED APPELLANT OF A FAIR TRIAL.

III. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL REJECTED A PLEA OFFER BEFORE INFORMING APPELLANT AND IMPROPERLY ADVISED APPELLANT OF SAID OFFER.

VI. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR A NEW TRIAL

First Assignment of Error

{¶26} In his first assignment of error, Kegg argues that the trial court erred by not holding a Daubert hearing before admitting Mitchell as an expert witness. A Daubert hearing would have exposed Mitchell's deficiencies and shown that "Mitchell's qualifications did not satisfy two (2) of the three (3) requirements under Rule 702." In support of his argument, Kegg asserts that Mitchell's testimony was not so far removed from the knowledge or experience of a layperson. In other words, delayed disclosure is not a proper subject for expert

testimony. Kegg also claims that Mitchell was not qualified to be an expert in delayed disclosure. Finally, while Mitchell "may have expressed professional experience working with survivors, the trial court erred when it automatically imputed reliability into the subject matter of her testimony." At no point did Mitchell "testify about any reliable scientific, technical, or specialized information." In addition to his three arguments, Kegg further claims that Mitchell "testified about false reporting and provided numbers and percentages on the probability of false assault reports."

{¶27} In response, the State argues that it is "clear from the case law and Ms. Mitchell's testimony that her testimony was based on ample experience which is considered specialized knowledge." Further, the State offered Mitchell's "testimony to aid the trier of fact on an issue not commonly known to jurors." Therefore, the court did not abuse its discretion in concluding that Mitchell was competent to testify as an expert on delayed reporting.

A. Law

{¶28} " 'The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.' " *State v. Robb,* 88 Ohio St.3d 59, 68 (2000), quoting *State v. Sage,* 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. That includes "[t]he decision to grant or deny a defendant's request for an expert witness." *State v. Brady*, 2008-Ohio-4493, ¶ 23.

{¶29} In assessing whether a witness qualifies as an expert, the trial court acts as a "gatekeeper" to ensure that the witness is qualified under Evid.R, 702. *Valentine v. Conrad*, 2006-Ohio-3561, ¶ 17. However, in undertaking that role,

there is no requirement for a court to hold a hearing. *Ellis v. Fortner*, 2021-Ohio-1049, ¶ 9 (9th Dist.). The decision whether to hold a hearing is within a court's discretion. *See In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 532 (6th Cir. 2008).

{¶30} "[A]n abuse of discretion is more than an error of law or judgment; rather, it implies that a court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Landers*, 2010-Ohio-3709, ¶ 4 (4th Dist.), citing *State v. Herring*, 94 Ohio St.3d 246, 255 2002). "Furthermore, an abuse of discretion means that the result is so palpably and grossly violative of fact or logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance of judgment, not the exercise of reason but, instead, passion or bias." *Id.*, citing *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256 (1996).

{¶31} For a witness to qualify as an expert, he or she must satisfy three criteria:

> First, the witness's testimony must "either relate[ ] to matters beyond the knowledge or experience possessed by lay persons or dispel[ ] a misconception common among lay persons." Evid.R. 702(A). Second the witness must be qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Evid.R. 702(B). Finally, the witness's testimony must be "based on reliable scientific, technical, or other specialized information." Evid.R. 702(C).

Selbee v. Van Buskirk, 2018-Ohio-1262, ¶ 50 (4th Dist.).

B. Analysis

{¶32} We begin our analysis by addressing Kegg's first argument that delayed reporting of a sexual offense by the victim to law enforcement is not a proper subject for expert testimony. While the Ohio Supreme Court has not addressed the issue, the Supreme Court of Vermont has determined "that familiarity with delayed and inaccurate reporting of sexual assault is not a subject within the ken of most jurors. * * * [Therefore] testimony on the topic from witnesses qualified by specialized or technical knowledge or experience to speak on the frequency of delayed reporting by sexual assault victims" is permitted. *State v. Hammond*, 54 A.3d 151, ¶ 31 (2012). Similarly, numerous Ohio appellate districts have recognized that sexual assault victims often delay reporting the crime to law enforcement, and delayed reporting is not within the knowledge of the average juror thereby making it a proper topic for expert testimony. *See* S*tate v. Solether*, 2008-Ohio-4738, ¶ 65 (6th Dist.); *State v. McGlown*, 2009-Ohio-2160, ¶ 40 (6th Dist.); *State v. Grandberry*, 1994 WL 527910, * 4 (9th Dist. Sept. 28, 1994); *State v. Cook*, 2017-Ohio-7953, ¶ 48-51 (11th Dist.). We agree with the conclusion reached in each of these cases. Therefore, we reject Kegg's argument that delayed reporting is not a proper subject for expert testimony under Evid.R. 702(A).

{¶33} In his second argument, Kegg maintains that Mitchell was qualified as an expert witness on "victim behaviors[,]" but she testified about delayed disclosure for which she was not qualified.

{¶34} " 'Professional experience and training in a particular field may be sufficient to qualify one as an expert.' " *Solether*, at ¶ 68 (6th Dist.), quoting

State v Mack, 73 Ohio St. 3d 502 (1995). In *Solether*, the appellant was charged with rape. Police Officer, Robert Gates, testified for the State as an expert on delayed reporting of sexual assault. *Id*. at ¶ 47. Gates testified that he had "conducted 150 to 200 sexual assault investigations[,]" and had " 'attended a couple of schools several years ago.' " *Id*.

{¶35} At trial, Gates was asked: "Based upon your training and experience is it unusual for a victim of sexual assault not to report the assault immediately?" *Id*. at ¶ 49. Gates responded: "No, that's not unusual." *Id*. at ¶ 50.

{¶36} On appeal, appellant asserted that Gates was not qualified to testify as an expert on delayed reporting. *Id*. at ¶ 46. After recognizing that professional experience and training in a particular field may be sufficient to qualify a witness as an expert in that field, the court of appeals found that Officer Gates had a sufficient degree of specialized knowledge to testify regarding delayed reporting by sexual assault victims. *Id*. at ¶ 68-69. Thus, it overruled appellant's assignment of error.

{¶37} In the case at hand, Mitchell has a bachelor's degree and master's degree in social work. She worked at the International Institute of New Jersey with survivors of sexual violence and war refugees. She later joined the Survivor Advocacy Outreach Program, initially as a volunteer coordinator, where she completed a 40-hour advocacy training focused on the dynamics of sexual and domestic violence. At the time of her testimony, she was working as the direct service coordinator, coordinating all crisis advocacy and working on the crisis hotline, providing direct advocacy for survivors. She now facilitates the 40-hour

training for new volunteers 3 to 4 times a year, accumulating over 400 hours of training facilitations. She estimated having worked with at least a 1,000 sexual assault victims throughout her experience.

{¶38} Mitchell provided testimony regarding why victims of sex offenses often delay reporting the crime to legal authorities. They included a strong fear of not being believed, fear of retribution, they might be physically attacked, they don't want to identify as a victim, they are scared of the criminal justice process, or they don't know what the options are. She even testified that students of a sexual assault may have additional reasons to delay reporting, including: that they live in a small campus community and may not want other people to know what happened or they might be pre-occupied with their purpose for going to college, i.e., getting through classes, graduating, finishing up an internship.

{¶39} Similar to the police officer in *Solether*, we find that Mitchell's extensive experience with sexual assault victims, and to a lesser degree her education, qualified her as an expert in testifying regarding said victims, including that they often delay reporting the assault to the authorities. Therefore, based on our review of the record, we find that Mitchell was qualified as an expert through specialized knowledge, skill, experience, training and education regarding victims of sex offenses and that her testimony regarding delayed disclosure of abuse was based on that specialized information.

{¶40} Kegg's third argument asserts that "the trial court erred when it automatically imputed reliability into the subject matter of [Mitchell's] testimony.

At no point did Ms. Mitchell testify to any reliable scientific, technical, or specialized information.

{¶41} "Ohio courts have recognized that rape trauma syndrome is accepted within the scientific community." *State v. Grandberry*, 1994 WL 527910, *4 (9th Dist. Sept. 28, 1994), citing *State v. Moore* 1989 WL 21233 (9th Dist. Mar. 8, 1989); *see also State v. Jones*, 83 Ohio App.3d 723, 731 (2d Dist. 1992); *State v. Mertens*, 90 Ohio App.3d 462, 467 (3rd Dist. 1993); *State v. Maye*, 1988 WL 35819 (10th Dist. March 22, 1988); *State v. Witman* 16 Ohio App.3d 246, 247 (11th Dist. 1984); Rape trauma syndrome indicates the "existence of a pattern of behaviors typical of rape victims which was known as rape trauma syndrome." *Moore* at *2. Information pertaining to rape trauma syndrome is "useful in criminal cases to explain the complainant's unusual behavior after the incident." *Mertens* at * 346. This includes helping understand why the victim would delay her report of the rape. *Grandberry* at * 4. Although Mitchell did not expressly reference rape trauma syndrome, she did testify that one result of trauma from sexual assault is that the victim may delay reporting the crime to the authorities. Therefore, we disagree with Kegg and find that Mitchell testified to reliable scientific, technical and specialized information.

{¶42} Finally, Kegg asserts that Mitchell testified about false reporting of sex abuse allegations and provided numbers and percentages on the probability of false reports. He alleges that she provided no sources for those numbers, or disclosed how she calculated them. This allegation arises from defense counsel's cross examination of Mitchell:

> Q: I'm sure you've seen the studies about false sex abuse allegations?
>
> A: I have seen some yes.
>
> Q: What do you think about these?
>
> A: I think it's interesting. Some of them have the false report rates as low as *two percent*. Some I've seen have up to *six percen*t but I do think uh, part of what gets conflated in the false reporting is the reports that are proven false are also lumped in with, with police reports that have been deemed unfounded. Which isn't to say that an assault didn't happen, just maybe that it didn't reach the statute or that, it, there wasn't enough evidence or something like that.

(Emphasis added.)

Because "[Kegg's] counsel elicited this testimony during [Mitchell's] cross-examination . . . [Kegg] invited any error that may have occurred." *State v. Smith*, 2022-Ohio-371, ¶ 41 (4th Dist.), citing *State v. Hare*, 2018-Ohio-765, ¶ 45 (2d Dist.) (the invited-error doctrine applies when defense counsel elicits allegedly improper testimony on cross-examination). "The invited-error doctrine precludes a litigant from ' "tak[ing] advantage of an error which [the litigant] invited or induced." ' " *Id*., quoting *State v. Ford*, 2019-Ohio-4539, ¶ 279, quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.*, 28 Ohio St.3d 20 (1986), paragraph one of the syllabus.

{¶43} "Consequently, [Kegg] cannot now challenge the testimony as improperly admitted." *Id*. Therefore, we reject Kegg's challenge to Mitchell's testimony regarding false reporting of sex abuse allegations.

{¶44} Based on the aforementioned, we find that the trial court did not abuse its discretion in permitting Mitchell to testify as an expert witness for the

State that sexual assault victims often delay reporting the offense to legal authorities. Accordingly, we overrule Kegg's first assignment of error.

Second Assignment of Error

{¶45} In his second assignment of error, Kegg argues that the trial court erred when it failed to excuse Juror Four from the jury depriving him of a fair trial. Kegg maintains that the trial court abused its discretion when it declined to dismiss Juror Four because she admitted to being friends with the State's expert witness, Mitchell. Kegg claims that the court's voir dire of Juror Four was insufficient to rehabilitate her. Additionally, the trial court did not conduct a voir dire of the remaining jurors to determine whether Juror Four had biased them. Thus, Kegg maintains that not dismissing Juror Four biased him and violated his right to a fair trial.

{¶46} In response, the State asserts that a trial court has discretion when to remove a biased juror. The State claims that in this case when the trial court learned that Juror Four knew Mitchell, the court conducted a voir dire of Juror Four. Juror Four indicated that she had not spoken to Mitchell in over a year. She also stated that she had not spoken to Mitchell about the case or spoken to the jurors about Mitchell. Finally, the judge asked Juror Four if she still believed that she could be a fair and impartial juror in this case, she responded: "correct."

{¶47} The State claims that there is no evidence that Juror Four was biased. Therefore, the trial court did not abuse its discretion by not dismissing Juror Four from the jury.

A. Law

{¶48} " 'Trial courts have discretion in determining a juror's ability to be impartial.' " *State v. Posey*, 2008-Ohio-6510, ¶ 20 (4th Dist.), quoting *State v. Cornwell,* 86 Ohio St.3d 560, 562, 1999-Ohio-125 (1999). " '[T]he determination of whether a prospective juror should be disqualified for cause is a discretionary function of the trial court. Such determination will not be reversed on appeal absent an abuse of discretion.' " *Id*., quoting *Berk v. Matthews*, 53 Ohio St.3d 161, 169 (1990). "A reviewing court should not disturb a trial court's decision regarding a challenge for cause ' * * * unless it is manifestly arbitrary * * * so as to constitute an abuse of discretion.' " (Ellipses original) *Id*. quoting *State v. Stallings,* 89 Ohio St.3d 280, 287, 2000-Ohio-164 (2000) quoting *State v. Tyler*, 50 Ohio St.3d 24, 31 (1990). "An appellate court must give deference to the trial court because it is the trial court that actually sees and hears the potential jurors." *Id*., citing *State v. Wright,* 2001-Ohio-2473, *20 (4th Dist.); *Stallings* at 288.

B. Analysis

{¶49} When it came to the court's attention that Juror Four knew Mitchell, the court conducted a voir dire of her. During the voir dire, Juror Four admitted to knowing Mitchell, but stated that they had not talked in at least a year. She also stated that she had not spoken to the other jurors about her relationship with Mitchell. Finally, after being asked whether she still thought that she could be fair and impartial as a juror in this case, her response was: "correct." Also, defense counsel had no objections. Based on these facts, and affording some deference to the trial judge because he personally spoke to Juror Four, we find that the

court's decision to not dismiss Juror Four was not an abuse of discretion. Thus, we overrule Kegg's second assignment of error.

Third Assignment of Error

{¶50} In his third assignment of error, Kegg asserts that he was denied effective assistance of counsel for his trial counsel's actions during plea negotiations with the State.

{¶51} Kegg alleges that on May 28, 2023, the assistant prosecutor sent a text to his trial counsel, which detailed a plea offer. Kegg claims his trial counsel rejected the State's plea offer without consulting him. The offer was to amend the charge to felonious assault with a recommended sentence of four years. However, Kegg claims that his trial counsel relayed that the offer was aggravated assault, which carries a lesser penalty. Finally, Kegg claims that his counsel's statement that he was not authorized to negotiate a plea with the State on Kegg's behalf was false. For these reasons, Kegg alleges that his trial counsel was ineffective.

{¶52} Kegg claims "but for" his counsel's error, the outcome of this case would have been different because he would not have gone to trial. He claims that the record shows that he was not informed of the State's plea offer until after his counsel had rejected it. And the offer that his counsel did relay to him was "agg assault[,]" which was significantly different from the State's actual offer, which was felonious assault. Aggravated assault is a fourth-degree felony that has a maximum penalty of 18 months in prison, while felonious assault is a second-degree felony that has a maximum penalty of 8 years in prison.

{¶53} Kegg claims that his counsel's failures in this regard are consistent with the fact that his counsel never informed him of the minimum and maximum penalties for rape, which can be supported by jail calls placed into the record at Kegg's bond hearing.

{¶54} Thus, Kegg maintains that both prongs of the *Strickland* test have been satisfied, i.e., his trial counsel's representation was deficient because he rejected the State's plea offer without input from Kegg, which resulted in prejudice to Kegg because he would have considered the plea had he been properly informed, potentially leading to a different outcome.

{¶55} In response, the State argues that Kegg's trial counsel was not ineffective due to actions that occurred during the plea-bargaining process.

{¶56} The State maintains that Kegg's assertion that his counsel was ineffective relies heavily upon statements that he made in his affidavit attached to his motion for a new trial. The State claims that said evidence is outside the record, and, therefore, cannot be considered in resolving Kegg's claim for ineffective assistance of counsel.

{¶57} The State also argues that Kegg's trial counsel did provide the State's plea offer to him in writing, by forwarding the assistant prosecutor's text message to Kegg that contained a plea offer of "felonious assault with 4 jr after 6". Therefore, Kegg's claim that his trial counsel did not communicate the State's offer to him lacks merit. And Kegg responded: "thank you for the info[,]" indicating that he received the offer. The State notes that it does not appear that Kegg asked any follow-up questions, which supports that he did not wish to

negotiate a plea. And discussion of any plea bargaining outside the record is unknown to the State.

{¶58} The State recognizes that in addition to the forwarded text message as referenced above, Kegg's counsel also sent a text message to Kegg that communicated the State's offer incorrectly, i.e., the text from Kegg's trial counsel stated: "agg assault." However, the State asserts that exhibit B, attached to Kegg's motion for a new trial, makes clear that the State's offer was felonious assault. If Kegg was unsure, then he could have asked his trial counsel to clarify, but he did not, and, instead, merely stated "thanks for the info." The State also notes that it was unaware of any discussions beyond these messages because it is not part of the record.

{¶59} Further, the State's offer was placed on the record just prior to the start of trial, and it was expressly rejected, i.e., Kegg's trial counsel stated that he was not authorized to negotiate for Kegg. The court also asked Kegg if there were any reasons why the case should not proceed to trial and Kegg indicated he was ready for trial. The State claims that Kegg's decision to go to trial does not establish that his trial counsel was ineffective.

{¶60} The State additionally maintains that Kegg's entire argument regarding the maximum and minimum sentence does not appear to be based on any evidence in the record aside from the comment made in a jail phone call. Evidence outside the record cannot be considered on appeal. Therefore, the State asserts that Kegg's claim that his counsel was ineffective should be rejected.

A. Law

{¶61} To prove ineffective assistance of counsel, a petitioner "must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Short*, 2011-Ohio-3641, ¶ 113 (4th Dist.), citing *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). Therefore, "[f]ailure to establish either element is fatal to the claim." *State v. Jones*, 2008-Ohio-968, ¶ 14 (4th Dist.).

{¶62} "In Ohio a properly licensed attorney is presumed competent." *State v. Ruble*, 2017-Ohio-7259, ¶ 47 (4th Dist.), citing *State v. Gondor*, 2006-Ohio-6679, ¶ 62. Therefore, the movant has the burden of proving that his trial counsel was ineffective. *Id*. " 'In order to overcome this presumption, the petitioner must submit sufficient operative facts or evidentiary documents that demonstrate that the petitioner was prejudiced by the ineffective assistance.' " *State v. Avery*, 2024-Ohio-3094, ¶ 17 (4th Dist.), quoting *Gondor* at ¶ 62.

{¶63} In the context of determining whether counsel provides ineffective assistance of counsel, the Supreme Court has held that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012).

{¶64} "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient

performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Id*. at 147.

> When affidavits or other proof outside the record are necessary to support an ineffective assistance claim, however, it is not appropriate for consideration on direct appeal. *State v. Zupancic*, 2013-Ohio-3072, ¶ 4 (9th Dist.) *State v. Madrigal,* 87 Ohio St.3d 378, 390–391 (2000). "[A] claim of ineffective assistance of counsel on direct appeal cannot be premised on decisions of trial counsel that are not reflected in the record of proceedings * * * [and] [s]peculation regarding the prejudicial effects of counsel's performance will not establish ineffective assistance of counsel."

State v. Zupancic, 2013-Ohio-3072, ¶ 4 (9th Dist.), quoting *State v. Leyland,* 2008–Ohio–777, ¶ 7 (9th Dist.).

B. Analysis

{¶65} On May 28, 2023, Kegg's trial counsel forwarded to Kegg a text thread between himself and the assistant prosecutor wherein the assistant prosecutor provided a plea offer. Kegg's trial counsel indicated via text to Kegg that he was ethically required to disclose the offer to him. The text forwarded to Kegg stated the following exchange between the assistant prosecutor and Kegg's counsel:

> Assistant Prosecutor: "we would [offer] felonious assault with 4 jr after 6."
>
> Kegg's Counsel: "Not even close. See you Tuesday am."

Kegg's trial counsel further texted Kegg stating that the "offer is you plead guilty to agg assault. Felony ordered to serve 4 years but release from prison after

serving 6 months. No sex offender registration." Kegg responded: "thank you for the info."

{¶66} Also important to this analysis is that when the State placed its offer to Kegg on the record, Kegg's trial counsel stated that he had never been authorized to negotiate a plea with the State on Kegg's behalf. Contrary to Kegg's assertion, there is nothing in the record that indicates that this statement was false. Kegg "submits" that his counsel never disclosed to him the minimum and maximum sentences for rape, which he claims, is supported by jail calls made by Kegg wherein he indicated that he thought he could get probation even though his rape conviction mandated a prison sentence. We find that both the supposition that counsel did not inform Kegg of the sentence for rape and the inference drawn therefore is speculative at best. We find trial counsel's rejection of the plea was consistent with his lack of authority to negotiate. Even so, immediately after he rejected the plea, consistent with his ethical requirements and the law, Kegg's counsel disclosed the plea to Kegg anyway.

{¶67} Admittedly, counsel incorrectly identified the plea as being for aggravated assault, rather than felonious assault. Notably, however, counsel correctly informed Kegg that the plea included a recommended sentence of four years in prison with judicial release after six months. Even if we were inclined to find that trial counsel's disclosure of the partially inaccurate offer was deficient representation, we find it resulted in no prejudice. A recommended sentence of a four-year prison term, with judicial release after six months of incarceration, is a significantly less punishment than the maximum he could have received if

convicted of rape, which was up to ten years in prison. *See State v. Jordan*, 2004-Ohio-2775, ¶ 9 (6th Dist.). Yet, Kegg's text response to the offer was merely said - "thanks for the info." Additionally, even after the plea was read into the record in court, Kegg remained silent.

{¶68} Based on the evidence in the record, we find that the representation provided by Kegg's trial counsel was not deficient, and, even if it was, Kegg was not prejudiced. Accordingly, we find that Kegg's trial counsel was not ineffective and overrule his third assignment of error.

Fourth Assignment of Error

{¶69} In his fourth assignment of error, Kegg asserts that the trial court abused its discretion when it denied appellant's motion for a new trial. He then then cites R.C. 2953.21(A)(1)(a)(i), which states:

> Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States.

Kegg maintains "R.C. 2953.21(C), now (D), provides that before granting a hearing "the court shall determine whether there are substantive grounds for relief." Citing paragraph two of *State v. Bradley*, 42 Ohio St.3d 136, he then claims that "[a] hearing is warranted on an accusation that defense counsel deprived a defendant of his constitutional right to reasonably effective assistance if the petitioner raises sufficient operative facts to indicate that his attorney's performance falls below an objective standard of reasonable representation and the defendant is prejudiced as a result."

{¶70} Kegg argues based on the affidavit and documentation of attorney-client communication he submitted in support of his motion for a new trial, a hearing was warranted to "review counsel's statements made on the record, which were in direct conflict with [Kegg's] allegations." Kegg claims that "[b]ut for counsel's failure to communicate with his client (and subsequent cover up on record) [he] would have made a different decision than that to proceed to trial." Therefore, Kegg maintains that the trial court abused its discretion in not holding a hearing.

{¶71} In response, the State argues that Kegg continues to state that he would have made a different decision then going to trial, but there is no evidence of this in the record. Therefore, this court cannot even "consider the statement."

{¶72} The State also maintains that the court in denying Kegg's motion for a new trial did make finding of facts and conclusions of law.

{¶73} Finally, the State argues that Kegg is merely regretting not taking the plea deal after being convicted of rape and being sentenced to a prison term, but "buyer's remorse" is not prejudice for purposes of an ineffective assistance of counsel claim.

A. Law

1. Standard of Review

{¶74} The decision to grant or deny a motion for new trial is committed to the sound discretion of the trial court. *State v. Puckett*, 2001-Ohio-2463, 143 Ohio App. 3d 132, 135 (4th Dist.), citing *State v. Matthews*, 81 Ohio St.3d 375 (1998), citing *State v. Schiebel*, 55 Ohio St.3d 71 (1990), paragraph one of the

syllabus. Therefore, "[w]e will not reverse a trial court's denial of a motion for new trial absent an abuse of that discretion." *Id*., citing *Sharp v. Norfolk W. Ry. Co.*, 72 Ohio St.3d 307 (1995). "An abuse of discretion implies that a court's ruling is unreasonable, arbitrary, or unconscionable; it is more than an error in judgment." *Id*., citing *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149 (1996).

2. Crim.R. 33

{¶75} Kegg's motion for a new trial under Crim.R. 33(A)(1) alleged his trial counsel's ineffectiveness caused an "irregularity" that prevented him from having a fair trial. Crim.R. 33(A) states that "[a] new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial[.]" " 'A new trial may be granted under Crim. R. 33(A)(1) only when there is an irregularity, and when the record demonstrates that defendant was prejudiced thereby or denied a fair trial.' " *State v. Taylor*, 2016-Ohio-7953, ¶ 7 (9th Dist.), quoting *State v. Mason*, No. 11182, 1983 WL 3913, *2 (9th Dist. Nov. 9, 1983).

{¶76} "Criminal Rule 33 does not require a hearing on a motion for new trial and the decision to conduct a hearing lies within the sound discretion of the trial court." *State v. Hill*, 2018-Ohio-4800, ¶ 85 (11th Dist.), citing *State v. White*, 2017-Ohio-6984, ¶ 28 (8th Dist.). "An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Martin*, 2024-Ohio-2334, ¶ 63 (4th Dist.),

citing *State v. Hancock*, 2006-Ohio-160, ¶ 129-130.

{¶77} Also important in this case is that "[a] claim of ineffective assistance of counsel is cognizable in a motion for a new trial pursuant to Crim.R. 33(A)(1)." *State v. Lei*, 2006-Ohio-2608, ¶ 24-25 (10th Dist.), citing *State v. Farley,* 2004-Ohio-1781, ¶ 11 (10th Dist.). However, "[a] new trial may be granted under Crim. R. 33(A)(1) only when there is an irregularity, and when the *record* demonstrates that defendant was prejudiced thereby or denied a fair trial." (Emphasis added.) *State v. Taylor*, 2016-Ohio-7953, ¶ 7 (9th Dist.); *State v. Jones*, 2024-Ohio-4538, ¶ 65, (3rd Dist.).

> [T]he General Assembly has provided a procedure whereby a convicted defendant can present evidence outside the original trial record of his counsel's ineffectiveness. This procedure, a proceeding for postconviction relief, is established by R.C. 2953.21. Pursuant to that statute a defendant may submit a verified petition and supporting affidavits in support of his position that he was denied the effective assistance of counsel. In certain cases the defendant is also entitled to a hearing on his verified petition.

State v. Gibson, 69 Ohio App. 2d 91, 95 (8th Dist. 1980).

Therefore, if a motion for ineffective assistance of counsel relies on evidence outside the trial court's record, a petition for post-conviction relief is the appropriate legal vehicle to use, not Crim.R. 33(A)(1). *See State v. Hedgecoth*, 2003-Ohio-3385, ¶ 21 (1st Dist.).

B. Analysis

{¶78} Kegg is appealing the trial court's denial of his Crim.R. 33(A)(1) motion for a new trial based on the allegation that his counsel was ineffective, not

the denial of a petition for post-conviction relief.[1] Consequently, R.C. 2953.21, which addresses petitions for post-conviction relief, is not pertinent in resolving Kegg's fourth assignment of error, as he suggests in his brief, including, if, and when, a court is required to hold a hearing in a petition-for-postconviction-relief action.

{¶79} Moreover, Kegg's motion for a new trial included two attachments and an affidavit. One of the attachments was the text thread that included texts between the assistant prosecutor, Kegg's counsel, and Kegg, and contained the State's plea offer. The second attachment was a picture of a whiteboard with writing that purportedly addressed Kegg's trial strategy. The affidavit contained assertions from Kegg pertaining to his counsel and the State's plea offer.

{¶80} The text thread was admitted into evidence during the trial. However, the picture of the white board and the averments made in the affidavit were never discussed at trial, let alone admitted into evidence. Because they are not part of the record, they cannot be considered in resolving Kegg's Crim.R.33(A)(1) motion for a new trial, which permits a new trial for irregularities that can be shown from the *record*. Thus, of the three attachments to Kegg's motion for a new trial, only the text thread that included the State's plea offer was eligible for consideration in resolving Kegg's Crim.R. 33(A)(1) motion for a new

[1] In his motion for a new trial, Kegg also maintained that the trial court abused its discretion in permitting Mitchell to testify as an expert witness for the State. However, on appeal Kegg does not mention the improper admission of the State's expert witness as grounds to overturn the trial court's denial of his motion for a new trial.

trial. However, it is insufficient to show his counsel was ineffective, let alone that a hearing was warranted.

{¶81} Therefore, we find that the trial court did not abuse its discretion by not holding a hearing to consider Kegg's motion for a new trial. Accordingly, we overrule Kegg's fourth assignment of error.

CONCLUSION

{¶82} Having overruled all four of Kegg's assignments of error, we affirm the trial court's judgment entry of conviction.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the ATHENS COUNTY COURT OF COMMON PLEAS to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.