

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ANDREW CULLER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY **Case No. 22 CO 0011**

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2019 CR 72

BEFORE:

David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:

Affirmed.

Atty. Vito Abruzzino, Columbiana County Prosecutor, and *Atty. Tammie M. Jones*, Assistant Prosecuting Attorney, Columbiana County Prosecutor's Office, 135 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee and

Atty. Rhys B. Cartwright-Jones, 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: June 26, 2023

D'APOLITO, P.J.

{¶1} Appellant, Andrew Culler, appeals from a judgment of the Columbiana County Court of Common Pleas denying his petition for postconviction relief without a hearing. Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

{¶2} Appellant was indicted by the Columbiana County Grand Jury on one count of sexual battery, a felony of the third degree, in violation of R.C. 2907.03(A)(5), and two counts of gross sexual imposition, felonies of the fourth degree, in violation R.C. 2907.05(A)(4). The child victim was Appellant's biological daughter.

{¶3} Appellant waived his right to a jury trial and the matter proceeded to a bench trial on October 8, 2020. The trial court found Appellant guilty on all counts. The court later sentenced Appellant to consecutive terms of 42 months for sexual battery and 18 months for each gross sexual imposition count for an aggregate term of 78 months. The court also designated Appellant a Tier III Sexual Offender.

{¶4} Appellant timely appealed to this court, Case No. 20 CO 0030, raising four assignments of error. *State v. Culler*, 7th Dist. Columbiana No. 20 CO 0030, 2021-Ohio-4642, appeal not allowed, 166 Ohio St.3d 1473, 2022-Ohio-1156, 185 N.E.3d 1108. We found Appellant's assignments of error to be meritless and affirmed the trial court's judgment.

{¶5} On March 3, 2022, Appellant filed a "Petition for Postconviction Relief and Request for Discovery Period and Hearing." Appellant asserted his trial counsel was ineffective for failing to object to inadmissible, prejudicial hearsay testimony. Specifically, Appellant argued his trial counsel should have objected to recapitulations of what the victim stated during an interview.

{¶6} Appellee, the State of Ohio, filed a response asking the trial court to dismiss Appellant's petition without a hearing on the grounds of res judicata. The State also asserted Appellant's petition did not raise a valid claim of any constitutional right violation that would render the judgment void or voidable.

{¶7} The trial court denied Appellant's petition for postconviction relief without a hearing. The court found the petition was barred by the doctrine of res judicata.

{¶8} Appellant filed this appeal, Case No. 22 CO 0011, and raises one assignment of error.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DENYING ANDREW CULLER'S PETITION FOR POSTCONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING.

{¶9} In his sole assignment of error, Appellant argues the trial court erred in denying his petition for postconviction relief without a hearing. Appellant claims he submitted evidence de hors the record that his trial counsel was ineffective, thus requiring the trial court to hold an evidentiary hearing on his petition. Appellant asserts his trial counsel was ineffective for failing to object to hearsay testimony by various witnesses, including police officers and sexual assault examiners, as to what the victim told them regarding the sexual assaults. Appellant devotes the remainder of his appellate brief making the same arguments as he did on direct appeal concerning hearsay, hearsay exceptions, expert testimony, the role of child advocacy centers, and why his trial counsel was ineffective for failing to object to this testimony.

{¶10} In response, the State contends a hearing was not warranted in this case. The State asserts Appellant's arguments are barred by the doctrine of res judicata. The State contends Appellant's arguments are simply a restatement of the arguments he raised on direct appeal. The State points out that only one paragraph of Appellant's brief addresses any evidence outside of the record, referring to an affidavit that does not appear to exist. Moreover, even if res judicata does not bar Appellant's claims here, the State maintains Appellant has not met his burden of presenting evidentiary documents to show a denial of his constitutional rights or resulting prejudice.

{¶11} An appellate court reviews a trial court's denial of a petition for postconviction relief under an abuse of discretion standard. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. Abuse of discretion implies the trial court acted arbitrarily, unreasonably, or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶12} A postconviction petitioner is not automatically entitled to a hearing. *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982). Before granting an evidentiary hearing on the petition, the trial court shall determine whether there are substantive grounds for relief. R.C. 2953.21(C). The trial court's decision of whether to hold an evidentiary hearing in postconviction matters is reviewed for abuse of discretion. *State v. Haschenburger*, 7th Dist. Mahoning No. 08-MA-223, 2009-Ohio-6527, ¶ 43.

{¶13} R.C. 2953.21(F) provides in relevant part: “Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending.”

{¶14} In this case, Appellant's petition for postconviction relief and the record establish he is not entitled to relief. Thus, the trial court did not abuse its discretion in denying Appellant's petition without a hearing.

{¶15} The trial court found Appellant's petition was barred by the doctrine of res judicata. The doctrine of res judicata provides that any issue that could have been raised on direct appeal, and was not, is barred in later proceedings and not subject to review. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 16.

{¶16} Here, the trial court stated it agreed with the analysis of the issues by this court in Appellant's direct appeal. The trial court found that we “squarely considered and rejected” Appellant's assignment of error alleging ineffective assistance of counsel. The court noted Appellant presented his affidavit asserting his lack of knowledge as a basis for postconviction relief. However, the court reasoned that a petitioner's knowledge at the time of trial of the error relied on, or his fault in not discovering such error previously, bars a postconviction remedy. The court pointed out that Appellant was convicted and sentenced in October 2020. Thus, any claimed lack of knowledge was known to Appellant well before June 9, 2021, the date his appellate brief was filed in his direct appeal. Therefore, the court found it was possible to litigate any such claim in the direct appeal. The court further found that the evidence de hors the record was insufficient to advance Appellant's claim.

{¶17} Three assignments of error in Appellant's direct appeal addressed issues of witnesses repeating what the victim told them, which is what Appellant's postconviction petition is based on.

{¶18} In his first assignment of error, Appellant argued the trial court erred in admitting the testimony of the sexual assault nurse examiner, Monique Malmer. *Culler*, 2021-Ohio-4642, at ¶ 11. Because defense counsel did not object to this testimony, this court reviewed the assignment of error for plain error. *Id.* We summarized Malmer’s testimony as follows:

During the direct examination, Ms. Malmer does not state what the victim said specifically in the interview with the social worker. As can be seen from above, Ms. Malmer utilizes the tone of the victim’s voice, her ability to recall experiential details, and the physical exam to give her medical opinion of sexual abuse. Furthermore, on cross-examination she reiterated this is for medical purposes – “for diagnostic purposes for the medical exam.” Tr. 299.

Id. at ¶ 20.

{¶19} This court then concluded:

Ms. Malmer did not explicitly testify to child victim’s truthfulness. See *State v. Terry*, 6th Dist. Lucas No. L-19-1082, 2020-Ohio-6872, ¶ 26 (stating the SANE nurses’ testimony was not testimony regarding the truthfulness of the victim). Her testimony establishing her opinion that there was significant concern for sexual abuse was not based solely on the accusation by child victim, but rather was based on child victim’s ability to relay experiential details, her voice, and demeanor. Her opinion was based on the observations of the child’s demeanor or other indicators tending to show the presence of sexual abuse. *Coleman*, 2016-Ohio-7335 at ¶ 29.

Consequently, for those reasons, this court concludes Ms. Malmer’s testimony did not violate Evidence Rule 702 and accordingly there was no error, plain or otherwise.

Id. at ¶ 26-27.

{¶20} In his second assignment of error, Appellant argued the trial court erred in admitting the testimony of the two police officers, the boyfriend, the social worker and the intake investigator from the Child Advocacy Center as to what the victim told them. *Id.* at ¶ 36. Once again, because defense counsel did not object, we reviewed this assignment of error for plain error. *Id.*

{¶21} This court examined the testimony and concluded that most of it was not hearsay. We determined that Officer Moore’s testimony “was not offered to prove the truth of the allegation. Rather, it was used to show background information and to show how the investigation proceeded.” *Id.* at ¶ 40. Likewise, we determined Detective Haueter’s testimony was not hearsay because the victim’s statements as relayed by Detective Haueter were not offered to prove the truth of the matter asserted but to explain how the investigation proceeded. *Id.* at ¶ 45.

{¶22} The social worker from the Child Advocacy Center, Courtney Wilson, conducted the psychosocial assessment and diagnostic interview of the victim. Wilson relayed the information the victim disclosed during the interview. However, we determined this testimony was not hearsay under Evid.R. 803(4) as statements for purposes of medical diagnosis or treatment. *Id.* at ¶ 46.

{¶23} The intake investigator from Children Services, Tina Deal-Hendon, explained she observed the forensic interview. *Id.* at ¶ 47. The only testimony Deal-Hendon gave as to what the victim said was that the victim stated the abuse started when she was nine or ten and the last incident was in 2016. *Id.* Deal-Hendon also stated that at the conclusion of the investigation, she found the abuse allegation substantiated. *Id.* This court determined that the intake investigator’s testimony was equivalent to either a social worker or a police officer doing an investigation and as such is not hearsay. *Id.* But “even if it was hearsay, in this case the one statement regarding what age the sexual abuse began and ended did not rise to the level of plain error. The reasoning of the trial court at the bench trial did not rely on that one piece of information.” *Id.*

{¶24} As to the victim’s boyfriend’s testimony about what the victim told him months after the disclosure, this court determined it was “possibly” hearsay but that even if it were, it did not rise to the level of plain error. *Id.* at ¶ 44. We noted this was a bench trial and the trial court is presumed to rely on only relevant, material evidence in arriving

at its judgment. *Id.* Furthermore, the trial court stated in its judgment entry that it relied on the timing of initial disclosure, not on the boyfriend's testimony. *Id.*

{¶25} Finally, in his fourth assignment of error, Appellant argued his trial counsel was ineffective for failing to object to all of the testimony he took issue with in his first and second assignments of error. *Id.* at ¶ 57. In finding no merit with this assignment of error, this court reasoned:

As explained above in the first and second assignments of error, the majority of the testimony was not hearsay and none of the testimony violated the Confrontation Clause. Thus, it is difficult to conclude there was deficient performance in this case. Failure to object to error, alone, is not sufficient to sustain a claim of ineffective assistance. *State v. Fears*, 86 Ohio St.3d 329, 347, 715 N.E.2d 136 (1999). The Ohio Supreme Court has recognized that declining to interrupt the prosecutor's argument with objections, or failing to object to certain evidence, is not deficient performance, especially in a bench trial. See *State v. Keene*, 81 Ohio St.3d 646, 668, 693 N.E.2d 246 (1998).

Even if a small amount of the testimony was inadmissible hearsay and amounted to deficient performance, as the first and second assignments of error explain, the outcome would not have been different. The trial court provided this court with a comprehensive analysis of its reasoning for finding Appellant guilty. That reasoning was not based on any possible hearsay or inadmissible testimony. Accordingly, prejudice cannot be found in this instance. This assignment of error lacks merit.

Id. at ¶ 62-63.

{¶26} Thus, Appellant has not raised an issue in his postconviction petition that was not already raised or could have been raised on direct appeal. Appellant's arguments in postconviction mirror those in his direct appeal.

{¶27} Additionally, Appellant failed to attach any evidence to his petition that advanced his claim. Although Appellant refers to his affidavit in his appellate brief, no

affidavit is attached to his petition or appears in the record. Appellant attached the following to his petition: two printouts from the Ohio Department of Corrections showing his conviction and sentence; a copy of this court's opinion in his direct appeal; a printout showing Appellant appealed to the Ohio Supreme Court; and what appears to be a copy of an email or text message from Appellant stating that his attorneys advised him to go to a bench trial and did not advise him that certain witnesses' statements could be inadmissible. (Exhibits 1-5). None of these attachments advance Appellant's claim.

“‘[E]vidence presented outside the record must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* [that res judicata bars claims in postconviction that could have been raised on direct appeal] by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery.’”

State v. Lawson, 103 Ohio App.3d 307, 315, 659 N.E.2d 362, 367 (12th Dist.1995), quoting *State v. Coleman*, 1st Dist. Hamilton No. C-900811, 1993 WL 74756 (Mar. 17, 1993).

{¶28} Upon consideration, the trial court did not abuse its discretion in denying Appellant's petition for postconviction relief without a hearing.

CONCLUSION

{¶29} For the foregoing reasons, Appellant's sole assignment of error is not well-taken. The judgment of the Columbiana County Court of Common Pleas denying Appellant's petition for postconviction relief without a hearing is affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.