

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

SPENCER KIDDER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY **Case No. 26 CO 0009**

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 22 CR 569

BEFORE:

Katelyn Dickey, Cheryl L. Waite, Mark A. Hanni, Judges.

JUDGMENT:

Affirmed.

Atty. Vito Abruzzino, Columbiana County Prosecutor, and *Atty. Steven V. Yacovone*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee and

Atty. Rhys B. Cartwright-Jones, for Defendant-Appellant.

Dated: September 28, 2026

DICKEY, J.

{¶1} Appellant, Spencer Kidder, appeals the March 11, 2026 judgment entry of the Columbiana County Common Pleas Court dismissing his petition for postconviction relief and overruling his motion for limited discovery. Appellant advances five assignments of error. First, he argues the trial court erred in overruling the petition without an evidentiary hearing. Second, he asserts the trial court erred in overruling his motion for limited discovery, that is, a deposition of his trial counsel and certain document requests relating to his trial preparation. Third, Appellant argues the trial court erred in concluding res judicata applied to claims which are predicated on evidence outside of the record. Fourth, Appellant contends the trial court issued insufficient findings of fact and conclusions of law. Finally, Appellant argues the foregoing errors, if found to be harmless, constitute a due process violation when considered in concert. Finding no reversible error, the judgment entry of the common pleas court is affirmed.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are taken from Appellant's direct appeal:

The victim in this case is Appellant's biological son. The victim resided with his mother but would have overnight visits at Appellant's home on the weekends. According to the victim, during these visits Appellant would have the victim sleep naked in his bed with him. Appellant also consumed large amounts of alcohol when the victim was visiting. The victim said that starting when he was six or seven, Appellant would get in the bathtub with him and put his penis in the victim's anus. Appellant would also put his penis in the victim's mouth while they were in bed together. The victim would tell Appellant to stop, but Appellant would hit him and threatened the victim not to tell anyone what was happening. The victim stated that these things happened almost every time he visited Appellant. At first, because of his young age, the victim did not realize Appellant's behavior was wrong. But as he got older, he realized this was not normal father-son behavior.

In 2020, when the victim was 12 years old, he began telling his mother he did not want to visit Appellant but did not explain why. Mother also noticed a change in the victim's demeanor at that time. The victim stopped visiting Appellant. The victim also started cutting his own arms. The victim began talking with his school guidance counselor and another counselor at that time. In 2021, the victim eventually disclosed to his counselor that his father had been sexually abusing him. He also told a family friend about the abuse while they were playing a video game. The counselor called the victim's mother. Mother filed a police report and took the victim to Akron Children's Hospital. The victim underwent a medical examination and an interview at the Child Advocacy Center.

On September 14, 2022, a Columbiana County Grand Jury indicted Appellant on four counts of rape (Counts 1 through 4), first-degree felonies in violation of R.C. 2907.02(A)(1)(B); two counts of sexual battery (Counts 5 and 6), second-degree felonies in violation of R.C. 2907.03(A)(5); and one count of gross sexual imposition (Count 7), a third-degree felony in violation of R.C. 2907.05(A)(4). Appellant pleaded not guilty.

The matter proceeded to a jury trial on September 19, 2023. The jury heard testimony from numerous witnesses, including the victim and Appellant. It then found Appellant guilty as charged in the indictment. The trial court subsequently held a sentencing hearing. The court found that Counts 5 and 6 merged with Counts 1 and 2. It then sentenced Appellant to life in prison without parole on Counts 1 and 2, ten years to life on Counts 3 and 4, and 60 months on Count 7. It ordered the sentences on Counts 1 and 2 to run concurrently with each other, the sentences on Counts 3 and 4 to run concurrently with each other but consecutively to the sentences on Counts 1 and 2, and the sentence on Count 7 to run consecutively to the other sentences. The court also designated Appellant a Tier III sex offender.

State v. Kidder, 2025-Ohio-2905, ¶¶ 2-5 (7th Dist.), appeal not allowed, 2025-Ohio-5429.

{¶3} In his direct appeal, Appellant asserted the trial court committed plain error when it admitted expert testimony offered by the state because it was not an independent determination of whether the alleged sexual abuse occurred, but instead an assessment of the victim's credibility. Appellant further asserted the trial court committed plain error when it admitted hearsay testimony offered by the state, which also constituted a violation of the Confrontation Clause. Next, Appellant argued he received ineffective assistance of counsel because his trial counsel failed to object to the admission of the alleged improper testimony. Finally, Appellant argued there was insufficient evidence to support his convictions. We rejected Appellant's arguments and affirmed his convictions.

{¶4} Significantly, Appellant challenges the trial court's admission and his trial counsel's failure to object to the very same testimony based on the very same grounds (improper bolstering, hearsay, Confrontation Clause) in his postconviction petition. Therefore, our analysis of the state's testimony in the direct appeal is germane. With respect to the expert testimony offered by the state, we opined:

Monique Malmer is a nurse practitioner at Akron Children's Hospital Child Advocacy Center. She performed the medical examination of the victim after he disclosed the sexual abuse. She was qualified by the court as an expert in child sexual assault.

In this first assignment of error, Appellant asserts the trial court committed plain error in allowing Malmer's testimony as to the victim's credibility. He contends Malmer should not have testified to: her observations of the victim's behavior during the interview (Tr. 373); second-hand disclosures from the forensic interview that she did not conduct (Tr. 368-370); and a diagnosis of "highly concerning for sexual abuse" while conceding she did not find any physical evidence of sexual trauma (Tr. 380, 382). Appellant asserts the trial court specifically relied on this evidence in finding him guilty.

Appellant acknowledges his counsel did not raise an objection to this testimony during trial and, therefore, we are to apply a plain error review.

Plain error should be invoked only to prevent a clear miscarriage of justice. *State v. Underwood*, 3 Ohio St.3d 12, 14 (1983). Plain error is one in which but for the error, the outcome of the trial would have been different. *State v. Long*, 53 Ohio St.2d 91, 97 (1978).

Pursuant to Evid.R. 702, a witness may testify as an expert if (1) the witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons, (2) the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony, and (3) the witness' testimony is based on reliable scientific, technical, or other specialized information.

In this case, the trial court deemed Malmer an expert in child sexual assault. (Tr. 355). Thus, she was qualified to offer an expert opinion in this area.

According to the Ohio Supreme Court, "an expert's opinion testimony on whether there was sexual abuse would aid jurors in making their decision," and is therefore admissible under Evid.R. 702. *State v. Stowers*, 81 Ohio St.3d 260, 262-263 (1998); *State v. Gersin*, 76 Ohio St.3d 491, 494 (1996); *State v. Boston*, 46 Ohio St.3d 108, 129 (1989).

This Court summarized the principles to apply to in cases such as these in *State v. Culler*, 2021-Ohio-4642, ¶ 23-25 (7th Dist.):

The Eleventh Appellate District has aptly explained this area of the law:

In *State v. Boston*, 46 Ohio St.3d 108, 128, 545 N.E.2d 1220 (1989), the Ohio Supreme Court held that "an expert's opinion testimony on whether there was *sexual abuse* would aid the jurors in making their decision and is, therefore, admissible pursuant to Evid.R. 702 and 704." (Emphasis added.) However, "[a]n expert may *not* testify as to the expert's opinion of the

veracity of the statements of a child declarant” who claims she has been raped. (Emphasis added.). *Id.* at syllabus. In *State v. Stowers*, 81 Ohio St.3d 260, 261, 690 N.E.2d 881 (1998), the Supreme Court clarified its syllabus in *Boston*, and held “[a]n expert witness’s testimony that the behavior of an alleged child victim of sexual abuse is consistent with the behavior observed in sexually abused children is admissible under the Ohio Rules of Evidence.” *Stowers* at 261, 690 N.E.2d 881. “ ‘Most jurors would not be aware, in their everyday experiences, of how sexually abused children might respond to abuse.’ ” *Id.* at 262, 690 N.E.2d 881, quoting *Boston* at 128, 545 N.E.2d 1220. Such expert testimony is permitted “to counterbalance the trier of fact’s natural tendency to assess . . . delayed disclosure as weighing against the believability and truthfulness of the witness.” *Stowers* at 263, 690 N.E.2d 881.

State v. Ross, 2018-Ohio-452, 105 N.E.3d 355, ¶ 49 (11th Dist.).

We have previously found that a physician should not have been permitted to testify to his opinion that the child was a victim of sexual abuse where his opinion was based solely on the child’s narrative as this was essentially an opinion on the child’s credibility. *State v. Triplett*, 7th Dist. Mahoning No. 17 MA 0128, 2018-Ohio-5405, ¶ 98-100, citing *State v. Schewirey*, 7th Dist. Mahoning No. 05 MA 155, 2006-Ohio-7054, ¶ 50-51 (“When an expert bases their diagnosis on nothing more than what the child tells them, then their ‘diagnosis’ is nothing more than an opinion on the child’s veracity.”). In rendering that holding, we recognized that “an expert does not need physical findings to reach a diagnosis. If the expert relies on other facts in addition to the child’s statements, then the expert’s opinion will not be an improper statement on the child’s veracity.” *Id.*, citing *Schewirey* at ¶ 50 (such as where the child acts in a certain manner).

In considering our *Schewirey* decision, the Sixth Appellate District explained:

Therefore, an expert in child sexual abuse can testify as to his or her opinion on whether the child was abused, but the expert may not testify as to the veracity of the child's statements. A difficulty arises, however, where the expert bases his or her opinion that a child was sexually abused solely on the child's statements. In those cases, the expert's " 'diagnosis' is nothing more than an opinion on the child's veracity." *State v. Schewirey*, 7th Dist. Mahoning No. 05 MA 155, 2006-Ohio-7054, 2006 WL 3849292, ¶ 50. Thus, for the expert's opinion to be admissible, " 'there simply has to be something other than the child's unsupported allegations that assisted the expert in arriving at his or her opinion. This would obviously include physical evidence, but could also involve the expert's observations of the child's demeanor or other indicators tending to show the presence of sexual abuse.' " *Id.* at ¶ 48, quoting with approval *State v. Plymale*, 11th Dist. Portage No. 99-P-0012, 2001 WL 1388424 (Nov. 2, 2001) (Christley, J., dissenting).

State v. Coleman, 2016-Ohio-7335, 72 N.E.3d 1086, ¶ 27-29 (6th Dist.).

Culler, 2021-Ohio-4642, ¶ 23-25 (7th Dist.).

Thus, in considering Malmer's testimony, we must look at whether she based her opinion on other observations or indicators of sexual abuse and did not simply rely on the victim's statements.

Malmer testified that when the interview began, the victim appeared comfortable talking with the social worker about general subjects. (Tr. 373). But when the social worker began asking about the sexual assault, the victim's hands became tense and he was squeezing his fingers. (Tr. 373). Malmer stated this was a coping mechanism. (Tr. 373). She further observed that the victim said "no" to certain questions, clarified items, and corrected the social worker when she said something incorrect, all of which elicited more experiential details that supported her diagnosis of "concerning for sexual assault." (Tr. 374). She noted that the victim was

able to describe going upstairs at Appellant's house and going into the bathroom when Appellant would come in. (Tr. 374). He was also able to describe the "back and forth" motion that Appellant used and where he would ejaculate. (Tr. 374). Malmer next testified that the victim relayed that Appellant threatened to harm him if he told anyone what was happening. (Tr. 377). She stated this is a common reason for a delayed disclosure. (Tr. 377). Finally, Malmer noted that the victim had been cutting himself on his arms. (Tr. 382). The victim stated that he cut himself when he felt stressed. (Tr. 382). Malmer stated that cutting can be a coping mechanism for children who are abused. (Tr. 363-364).

At the conclusion of observing the victim's interview, Malmer conducted a head-to-toe medical exam of the victim. (Tr. 379). She did not find any physical evidence of sexual trauma, but that was not surprising to her. (Tr. 380). Malmer explained that the abuse was not recent and even if the abuse had been recent, anal tissue can expand and it heals quickly. (Tr. 380-381). She testified that in most cases of sexual assault, there are no physical findings. (Tr. 368). Malmer then testified that given all of the above, she rendered a medical diagnosis of "highly concerning for sexual abuse." (Tr. 383).

Malmer's testimony and her diagnosis of "highly concerning for sexual abuse" fit within the parameters established by the above-cited case law as permissible testimony. At no point did Malmer testify as to the victim's credibility or propensity for truthfulness. Instead she relied on numerous observations in reaching her diagnosis including: the physical signs of tension the victim displayed when asked about the sexual assaults; answering "no" to certain questions, clarifying items, and correcting the social worker when she said something incorrect; explaining experiential details of the assaults; threats to the victim being a common reason for delayed disclosure; and the victim's self-harm in the way of cutting, which is frequently a sign of abuse.

Thus, Malmer’s diagnosis was not based solely on the victim’s narrative but on many other observations as well. Likewise, there was no error, plain or otherwise, in admitting Malmer’s testimony regarding her observations of the victim and her medical diagnosis.

Accordingly, Appellant’s first assignment of error is without merit and is overruled.

Kidder at ¶ 8-20.

{¶5} We continued our analysis of the testimony offered by the state in the second assignment of error:

Here, Appellant argues virtually every component of the State’s case was introduced through third-party witnesses constituting violations of the Confrontation Clause and the hearsay rule.

The Confrontation Clause prohibits the introduction of testimonial statements by a non-testifying witness (unless that witness is unavailable to testify and the defendant had a prior opportunity for cross-examination). *State v. Grabe*, 2017-Ohio-1017, ¶ 20 (7th Dist.), citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

In this case, the victim took the stand, testified, and was available for cross-examination. So any statements as to what he may have told others do not raise a Confrontation Clause violation as the victim was a testifying witness. Likewise, the victim’s mother was also a testifying witness. And the victim’s counselor, Megan Miller Murphy, also testified. So any statements as to what they may have told other people do not raise Confrontation Clause violations.

“Also, the Confrontation Clause is not implicated when the testimony is not hearsay.” *State v. Culler*, 2021-Ohio-4642, ¶ 38 (7th Dist.), citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004); *Tennessee v. Street*, 471

U.S. 409, 414 (1985); *State v. Maxwell*, 2014-Ohio-1019, ¶ 131. As discussed below, the remaining testimony did not qualify as hearsay. Therefore, it did not raise Confrontation Clause issues.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is generally not admissible at trial. Evid.R. 802.

Once again, Appellant acknowledges his counsel did not raise an objection to this testimony during trial and, therefore, we are to apply a plain error review.

We will address each witness Appellant takes issue with in turn.

First, Appellant points us to testimony by Wellsville Police Lieutenant Marsha Eisenhart. Specifically, he takes issue with her statement recounting what Officer Doug Filippi and the victim's mother told her. (Tr. 197-198). And he takes issue with her statement that someone from the children's services agency stated that the case was substantiated. (Tr. 203).

Lt. Eisenhart testified regarding her investigation in this matter. She stated that she was off-duty when she was initially contacted by Officer Filippi who told her that the victim's mother was at the police station reporting that her son had been sexually assaulted by his father. (Tr. 197). She instructed the officer to have the mother take her son to Akron Children's Hospital. (Tr. 197). Lt. Eisenhart stated that she assumed responsibility for the investigation in this matter the next day. (Tr. 197-198). As part of her investigation, Lt. Eisenhart reviewed the report prepared by Officer Filippi. (Tr. 198). The report identified Appellant as the perpetrator. (Tr. 198). The lieutenant continued to testify regarding the steps in her investigation, describing the people she contacted and the statements she reviewed. (Tr. 198-203). She then testified that a children services' case

worker addressed the agency's concerns, "substantiated" the case, and then closed the case. (Tr. 203).

There were no objections to this testimony. *However, even if there were, any objections would have been overruled.* While the lieutenant's testimony contained several out of court statements, they were not offered to prove the truth of the allegations. Rather, they were used to show background information and to describe how the lieutenant's investigation proceeded. See *State v. Bound*, 2004-Ohio-6530, ¶ 34 (5th Dist.) (information officer discovered as a result of his conversation with witness was merely part of his criminal investigation and not hearsay). "[I]t is well-settled that statements offered by police officers to explain their conduct while investigating a crime are not hearsay because they are not offered for their truth, but rather, are offered as an explanation of the process of investigation." *State v. Warren*, 2004-Ohio-5599, ¶ 46 (8th Dist.), citing *State v. Price*, 80 Ohio App.3d 108, 110 (9th Dist. 1992); *State v. Braxton*, 102 Ohio App.3d 28, 49 (8th Dist. 1995); *State v. Blevins*, 36 Ohio App.3d 147, 149 (10th Dist. 1987).

Thus, there was no plain error in admitting Lt. Eisenhart's testimony.

Second, Appellant takes issue with a statement by the victim's mother as to what the victim had disclosed to his counselor, Megan Miller Murphy. (Tr. 231).

The victim's mother was testifying about how she learned of her son's abuse. She stated that the victim had been talking with Murphy while he was at school. (Tr. 230-231). She testified that Murphy called her at work and asked her to come pick up the victim because he had just disclosed to her that he was being sexually abused by Appellant. (Tr. 231). She went and picked the victim up from school. (Tr. 231). She stated the victim got right into the car but he did not want to talk with her about what he had just disclosed. (Tr. 232). The victim's mother said the victim was not comfortable

talking to her about any of the details of what happened. (Tr. 232). She described the actions she took including calling Appellant, reporting to the police, taking the victim to Akron Children's Hospital, and taking the victim to the Child Advocacy Center for an interview. (Tr. 232-234).

“It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed.” *State v. Thomas*, 61 Ohio St.2d 223, 232 (1980); *see also State v. Lucas*, 1996 WL 495579 (7th Dist. Aug. 29, 1996). The mother’s statements as to what Murphy told her were properly admissible here. Once the mother learned about the abuse from the counselor, this set in motion the events leading up to this case. The mother described the actions she took upon learning of this information from calling Appellant to confront him to filing a police report to then seeking treatment for her son. Thus, there was no plain error in admitting the mother’s testimony as to what the victim had disclosed to his counselor.

Third, Appellant takes issue with testimony by school guidance counselor Anne Eisenhart about what the victim's mother told her after Ms. Eisenhart called to tell mother that the victim had cuts on his arms. (Tr. 251). Ms. Eisenhart testified that when she called the victim’s mother to let her know about the cuts on the victim's arms the victim's mother told Ms. Eisenhart that the victim had been sexually assaulted by his father. (Tr. 251).

Appellant does not put this statement in context. Ms. Eisenhart began her testimony discussing her interactions with the victim over the years. (Tr. 246). She described a change in his demeanor in the sixth grade and when she would meet with him. (Tr. 247). Ms. Eisenhart explained that as a school guidance counselor she was very busy so she contacted the victim’s mother and received permission to arrange for Murphy to meet with the victim at school for counseling services. (Tr. 249-250). Then came Ms.

Eisenhart's testimony as to the cuts on the victim's arm and the mother's response to her about Appellant abusing him. (Tr. 251). Ms. Eisenhart testified as to what steps she took next regarding contacting the victim's teachers per the mother's request and contacting Murphy. (Tr. 252).

Once again, this testimony was admissible as it was offered to explain Ms. Eisenhart's role and her actions in this matter. *Thomas*, 61 Ohio St.2d at 232; *Lucas*, 1996 WL 495579 (7th Dist. Aug. 29, 1996). Thus, there was no plain error in admitting it.

Fourth, Appellant takes issue with a statement by the victim's cousin about what the victim told their mutual friend. (Tr. 266-268).

The victim's cousin testified that he and the victim were helping his uncle move when the victim rolled up his sleeves and the cousin noticed cuts on the victim's wrists. (Tr. 266). The cousin told the victim's mother about seeing the cuts. (Tr. 267). The cousin then began "looking into" the situation and learned from a mutual friend "about the stuff" that was going on. (Tr. 267-268). The cousin did not elaborate at all about what "the stuff" was or testify any further on the matter.

There is no hearsay issue with this testimony. The cousin's testimony about the cuts on the victim's wrists were from his own observations. And his testimony that he learned about the "stuff" that was going on was very vague. The cousin did not provide any further testimony or details about what the mutual friend may have told him.

Finally, Appellant takes issue with a statement by the victim's family friend about what the victim told him regarding the abuse. (Tr. 275-277).

The friend testified that he and the victim frequently played video games together via an Xbox gaming system. (Tr. 272). While they played, they were able to chat with each other using their headsets. (Tr. 275). The friend testified that in the fall of 2021, while they were playing, the victim

made some “very out of character” comments and jokes. (Tr. 274-275). The friend asked the victim what made him say these things. (Tr. 275). The victim started bawling and then the victim told the friend that his dad “touches him”, “stuck it in his ass”, and engaged in oral sex with him since he was six years old. (Tr. 275-276). The friend said the victim was “crying his eyes out” when he told him of the abuse. (Tr. 275).

The State argues that this statement was admissible under the excited utterance exception to the hearsay rule.

An “excited utterance” is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Evid.R. 803(2). For a statement to qualify as an excited utterance it must meet four requirements: “(1) a startling event, (2) a statement relating to that event, (3) a statement made by a declarant with firsthand knowledge, and (4) a statement made while the declarant was under the stress of the excitement caused by the event.” *State v. Dean*, 2015-Ohio-4347, ¶ 123.

The first three requirements are easily met here: (1) sexual assault is a startling event; (2) the victim’s statement here related to the event; and (3) the victim clearly had first-hand knowledge. The only question arises with the fourth requirement.

The victim made the statement to his friend in the fall of 2021 that Appellant had abused him. But the victim had not visited with Appellant since the fall of 2020. So the statement that he made to his friend was, at the least, a year after the last instance of abuse. It could be difficult to conclude that the statement was made while the victim was under the stress of the excitement caused by the event. However, “[t]here is no per se amount of time after which a statement can no longer be considered to be an excited utterance.” *State v. Taylor*, 66 Ohio St.3d 295, 303 (1993).

In cases of statements made by children who say they were sexually assaulted, the Ohio Supreme Court has upheld the admission of those statements even when made after a substantial lapse of time, recognizing that children are likely to remain in a state of nervous excitement longer than would an adult. *Id.* at 304. The Court pointed out: “This trend of liberalizing the requirements for an excited utterance when applied to young children who are the victims of sexual assault is also based on the recognition of their limited reflective powers. Inability to fully reflect makes it likely that the statements are trustworthy.” *Id.*

Applying the excited utterance exception to a case where a child sexual assault victim disclosed the abuse two years after it began, this Court noted:

“ ‘A reviewing court should give the trial court wide discretion when the trial court decides that statements made by a child-victim about sexually abusive acts qualify as excited utterances.’ ” *State v. Robinson*, 12th Dist. No. CA2015-01-013, 48 N.E.3d 109, 2015-Ohio-4533, ¶ 29, quoting *State v. Ashcraft*, 12th Dist. No. CA97-11-217 (Sept. 28, 1998), citing *State v. Wagner*, 30 Ohio App.3d 261, 263, 508 N.E.2d 164 (8th Dist.1986). “[W]hen the crime is rape, determining whether the victim is in an excited state is a factual question that is left to the trial court’s discretion.” *Ashcraft*, citing *State v. Smith*, 34 Ohio App.3d 180, 190, 517 N.E.2d 933 (5th Dist.1986).

State v. Palmer, 2022-Ohio-2643, ¶ 17 (7th Dist.).

Thus, the friend’s testimony as to what the victim disclosed to him in the case could have been admitted as an excited utterance. However, even if these statements did not rise to the level of an excited utterance, there was no plain error here. In other words, even if this testimony had been excluded, the outcome of the trial would not have been different. In addition to the evidence discussed in this assignment of error, the victim gave extensive testimony against Appellant.

Accordingly, Appellant's second assignment of error is without merit and is overruled.

(Emphasis added) *Kidder* at ¶ 22-51.

{¶6} Finally, we addressed Appellant's ineffective assistance of counsel claim predicated upon trial counsel's failure to object to the foregoing testimony:

In his final assignment of error, Appellant claims his trial counsel was ineffective for failing to object to the evidence set out in his first and second assignments of error. He claims the State's case lacked forensic support and the timeline of the alleged abuse was vague. Thus, Appellant argues that had his counsel objected to the above-cited evidence, he would not have been convicted.

To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bradley*, 42 Ohio St.3d 136, (1989), paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. *Id.* To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley* at paragraph three of the syllabus.

Appellant bears the burden of proof on the issue of counsel's ineffectiveness. *State v. Calhoun*, 86 Ohio St.3d 279, 289 (1999). In Ohio, a licensed attorney is presumed competent. *Id.*

As discussed in Appellant's first and second assignments of error, the evidence that Appellant claims his counsel should have objected to was admissible evidence and was not in violation of the Confrontation Clause or the hearsay rule. Therefore, it is difficult to suggest that failing to object to

this evidence constituted deficient performance. Moreover, the testimony provided by the victim and by way of his interview weighed heavily against Appellant. Thus, we cannot find resulting prejudice here.

Accordingly, Appellant's fourth assignment of error is without merit and is overruled.

Kidder at ¶ 70-74.

{¶7} In his February 6, 2026 postconviction petition, Appellant advanced six arguments. First, he asserted ineffective assistance of counsel, based on trial counsel's failure to object to the admission of testimony of the adult witnesses whose testimony allegedly bolstered the victim's testimony, as well as testimony substantiating a prior sexual misconduct allegation, and expert and quasi-expert testimony based on a lack of qualifications in the record. Second, Appellant argued there were possible violations of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) (failure to disclose exculpatory material) based on the lack of "expert reports, bench notes, worksheets, draft, methodology materials, or curricula vitae" in the record. (Petition, p. 8). Appellant further argued trial counsel never discussed hiring an expert to testify on his behalf. Third, Appellant contended testimony offered by the state contained numerous hearsay and Confrontation Clause violations. Fourth, Appellant asserted expert testimony was offered as a "proxy credibility determination or vouch" for the victim's truthfulness. (*Id.* at p. 9). Fifth, Appellant argued "the affidavits concerning appellate advice supply operative facts outside the trial transcript." (*Id.* at p. 10). (No affidavit was attached to the postconviction petition). Finally, assuming *arguendo* that the foregoing errors were harmless, Appellant contended they acted in concert and resulted in a violation of his right to due process.

{¶8} At the conclusion of the postconviction petition, Appellant requested the vacation of his conviction and sentence, or in the alternative, an evidentiary hearing. Appellant further sought "production or, at minimum, in camera review of expert and third-party material described in the accompanying motion for postconviction discovery including reports and bench notes in any." (*Id.* at p. 11). (No accompanying motion was

filed). The state argued Appellant's claims – specifically “ineffective assistance of counsel, *Brady* violations, improper expert testimony, vouching by witnesses, and cumulative error” – were barred by res judicata. (Mot., p. 2). The state further argued Appellant's assertion of prejudice was speculative, as the victim's testimony was the “crux of the State's case.” (*Id.* at p. 3). Finally, the state argued the significance of the evidence allegedly missing from the record was also based on speculation.

{¶9} On February 27, 2026, Appellant filed his opposition to the state's motion to dismiss, and motion for a limited 60-day discovery period, during which Appellant would be permitted to depose his trial counsel. Appellant filed an affidavit in support of the opposition brief and motion.

{¶10} More specifically, Appellant sought leave to depose trial counsel for “the limited purpose of examining counsel's preparation, investigation, strategic decisions, plea advice, expert consultation, and post-judgment advice, including but not limited to counsel's receipt, review, and use of expert reports, bench notes, worksheets, drafts, curriculum vitae, reliance materials, and communications with the State's witnesses.” (Opposition, p. 8). He further requested an order compelling the production of all of the forgoing documentation, as well as, “any materials provided to or received from the States' medical and mental health witnesses, together with any Children Services or related agency records referenced at trial, whether previously disclosed or not.” (*Id.* at p. 9). Appellant asserted the material would be reviewed by a “qualified independent expert retained by the defense.” (*Id.*). In order to avoid the assertion of privilege or work product by the state, Appellant requested in camera review by the trial court prior to the document production.

{¶11} In the affidavit, Appellant “vaguely” recalled an eleven-year plea offer from the state, but averred his trial counsel did not engage in any analysis of the plea offer, provide any explanation of the potential sentences following a guilty verdict, or explain that Appellant could enter a plea without admitting guilt. Although not mentioned in the postconviction petition, Appellant asserted in his affidavit that he was informed by his trial counsel that the victim would not testify, so Appellant was not able to participate in the preparation of questions for cross-examination.

{¶12} In his appellate brief, Appellant alleges his affidavit “identified specific omissions and missing materials: repeated narrative hearsay; lack of confrontation and limiting instructions; prior-acts testimony; Children Services substantiation testimony; unchallenged expert and quasi-expert testimony; no reliability hearing; no expert reports; bench notes; worksheets; draft findings; curricula vitae, methodology materials; or reliance data; no defense expert consultation; no meaningful plea-risk discussion; and no sound appellate-rights advice.” (Appellant’s Brf., p. 8-9).

{¶13} On March 11, 2026, the trial court dismissed the postconviction petition without an evidentiary hearing. The trial court opined Appellant had not shown there exists any rebuttal evidence to contravene the testimony of the adult witnesses. The trial court further opined there was no evidence in the record that trial counsel hired an expert or the state made a plea offer prior to trial. Next, the trial court characterized Appellant’s *Brady* and *Giglio* arguments as speculative. With respect to the testimony of the adult witnesses, the trial court concluded res judicata barred Appellant’s Confrontation Clause and hearsay arguments. Rather than relying on res judicata, the trial court undertook an analysis of the adult witnesses’ testimony and concluded it did not constitute improper vouching. Next, the trial court concluded Appellant’s affidavit contained no new evidence. Finding no harmless error, the trial court rejected Appellant’s cumulative error argument. Finally, the trial court overruled Appellant’s motion for discovery.

{¶14} This timely appeal followed. The first three assignments of error are addressed together as they assert procedural arguments, however the analysis is provided based on the specific substantive arguments, which Appellant asserts simultaneously without distinction in his appellate briefs.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED BY DENYING THE POSTCONVICTION PETITION WITHOUT AN EVIDENTIARY HEARING WHERE THE PETITION ALLEGED CONSTITUTIONAL CLAIMS DEPENDING ON EVIDENCE OUTSIDE THE TRIAL RECORD.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED BY DENYING LIMITED DISCOVERY, TRIAL COUNSEL’S DEPOSITION, AND A 60-DAY SUPPLEMENTATION PERIOD BEFORE DECIDING WHETHER THE PETITION STATED SUBSTANTIVE GROUNDS FOR RELIEF.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED BY APPLYING RES JUDICATA TO CLAIMS THAT DEPENDED ON EVIDENCE DEHORS THE RECORD, INCLUDING INEFFECTIVE ASSISTANCE, EXPERT-MATERIALS ISSUES, *BRADY/GIGLIO* ISSUES, AND POST-JUDGMENT ADVICE ABOUT APPELLATE RIGHTS.

{¶15} The essence of Appellant’s argument in this appeal is the trial court dismissed his postconviction petition due to a lack of evidentiary support, while contemporaneously prohibiting him from acquiring supporting evidence. Appellant argues the allegations and speculation in his affidavit constitute sufficient operative facts to establish substantive grounds for relief and therefore to warrant a hearing, even though they have been previously addressed in his direct appeal, could have been addressed on direct appeal, or are directly contradicted by the record.

{¶16} We summarized the law applicable to postconviction petitions earlier this year in *State v. Smith*, 2026-Ohio-1531, ¶ (7th Dist.), reconsideration denied, 2026-Ohio-2147 (7th Dist.):

Post-conviction relief is a collateral civil attack on a criminal judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67. R.C. 2953.21 through R.C. 2953.23 govern petitions for postconviction and provide that “any defendant who has been convicted of a criminal offense and who claims to have experienced a denial or infringement of his or her constitutional rights may petition the trial court to

vacate or set aside the judgment and sentence.” *State v. Martin*, 7th Dist. No. 12 MA 167, 2013-Ohio-2881, ¶ 13.

We apply an abuse of discretion standard when reviewing a trial court's decision to deny a post-conviction relief petition without a hearing. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. “Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough.” *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013-Ohio-2951, ¶ 21.

“[P]ursuant to R.C. 2953.21(C), a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief.” *State v. Calhoun*, 86 Ohio St.3d 279, 291, 1999-Ohio-102, 714 N.E.2d 905. Substantive grounds for relief exist where there was a denial or infringement of the petitioner's constitutional rights so as to render the judgment void or voidable. *State v. Cornwell*, 7th Dist. No. 00-CA-217, 2002-Ohio-5177, ¶ 25.

Smith at ¶ 7.

{¶17} The decision to grant or deny a request for discovery with respect to a petition for postconviction relief likewise rests within the trial court's discretion. *State v. Broom*, 2016-Ohio-1028, ¶ 28. The long-standing rule in Ohio is that a convicted criminal defendant has no right to additional or new discovery, whether under Crim.R. 16 or any other rule, during postconviction relief proceedings. *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 159 (1999), citing *State v. Spirko*, 127 Ohio App.3d 421, 429 (3d Dist. 1998). Nevertheless, discovery may be warranted when the “ ‘petitioner sets forth operative facts that demonstrate a substantive claim for relief.’ ” *State v. Maxwell*, 2020-Ohio-3027, ¶ 6 (8th Dist.), quoting *State v. McKelton*, 2015-Ohio-4228, ¶ 41 (12th Dist.).

{¶18} In *State v. Bunch*, 2022-Ohio-4723, the Ohio Supreme Court explained the distinction between the quantum of evidence required to schedule an evidentiary hearing versus a decision on the merits, and prohibited consideration of the merits when overruling a petition without a hearing:

In determining whether the petition states a substantive ground for relief, the trial court must consider the entirety of the record from the trial proceedings as well as any evidence filed by the parties in postconviction proceedings. R.C. 2953.21(D). If the record on its face demonstrates that the petitioner is not entitled to relief, then the trial court must dismiss the petition. R.C. 2953.21(D) and (E). If the record does not on its face disprove the petitioner’s claim, then the court is required to “proceed to a prompt hearing on the issues.” R.C. 2953.21(F); *see also State v. Hatton*, 169 Ohio St.3d 446, 2022-Ohio-3991, 205 N.E.3d 513, ¶ 28 (“The defendant is entitled to an evidentiary hearing when the allegations in the motion demonstrate substantive grounds for relief”).

A trial court’s decision to grant or deny a petition for postconviction relief after an evidentiary hearing is reviewed for an abuse of discretion. *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 45. Applying the wrong legal standard in a postconviction proceeding is also reversible error under an abuse-of-discretion standard. *Hatton* at ¶ 29.

. . .

The trial court’s entry dismissing Bunch’s postconviction petition made no mention of Bunch’s allegation that his trial counsel’s failure to use an expert witness was unreasonable in the specific context of his case. Instead, it concluded that counsel’s actions were not subject to a finding of ineffective assistance according to this court’s reasoning in *State v. Nicholas*, 66 Ohio St.3d 431, 613 N.E.2d 225 (1993), and *State v. Hartman*, 93 Ohio St.3d 274, 754 N.E.2d 1150 (2001) [sound trial strategy]. It further concluded that because Callier (Bunch’s coconspirator) identified Bunch in

his testimony, the expert testimony “would not have altered the trial’s outcome.” The appellate court, citing *Nicholas, State v. Thompson*, 33 Ohio St.3d 1, 514 N.E.2d 407 (1987), and *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, likewise presumed that trial counsel’s decisions were strategic and not subject to a finding of ineffective assistance. The appellate court held Bunch to the standard of proving that “the outcome of the proceedings would have been different but for counsel’s deficient performance.” 2021-Ohio-1244 at ¶ 23.

Both courts failed to apply the proper standard for reviewing whether a hearing was required on Bunch’s postconviction ineffective-assistance claim and instead treated Bunch’s claim as one on the merits in a direct appeal. Both courts also erroneously relied on the standard regarding the presumption of sound trial strategy articulated in *Nicholas, Thompson, Hartman*, and *Foust*. The factual context and the procedural posture of each of these four decisions render them inapposite, and thus they do not control the resolution of Bunch’s claim.

Bunch at ¶ 24-25; 28-29.

{¶19} The *Bunch* Court opined a hearing on a postconviction petition was required where eyewitness testimony was at the “core” of case, the state did not offer expert testimony regarding eyewitness accounts subject to cross-examination, and petitioner asserts ineffective assistance of counsel based on trial counsel’s failure to hire an expert on eyewitness identification. Significantly, Bunch attached the affidavit of an expert on eyewitness identification to his petition. In the affidavit, the expert opined the victim’s identification of Bunch was unreliable, given her initial reluctance to identify him in a face-only photograph. Notably, the dissent cited additional facts in the record that belied the expert’s conclusions regarding the reliability of the victim’s identification of Bunch.

{¶20} In addition to dismissal where the record establishes the petitioner is not entitled to relief, an appellate court may dismiss a postconviction petition without a

hearing where it concludes the petitioner could have raised the constitutional challenge in his direct appeal:

“A postconviction petition may also be dismissed without a hearing where the claims are barred by res judicata.” *State v. West*, 2009-Ohio-3347, ¶ 24 (7th Dist.). Res judicata bars any claim or defense that was raised or could have been raised in an earlier proceeding:

Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.

Smith, 2026-Ohio-1531, at ¶ 9 (7th Dist.).

{¶21} However, the Ohio Supreme Court has recognized a petitioner’s claims of ineffective assistance of counsel in a petition for postconviction relief “pose unique challenges” with respect to the application of res judicata, because such claims are often based on evidence outside the record. *State v. Blanton*, 2022-Ohio-3985, ¶ 29. Accordingly, “res judicata does not bar a postconviction ineffective-assistance-of-counsel claim when either (1) the petitioner had the same attorney at trial and on appeal or (2) he must rely on evidence outside the trial record to establish his claim for relief.” *Blanton* at ¶ 2. “ ‘Where [a] defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence dehors the record, res judicata is proper basis for dismissing [the] defendant’s petition for postconviction relief.’ ” *Blanton* at ¶ 30, quoting *State v. Cole*, 2 Ohio St.3d 112 (1982), syllabus. The applicability of the doctrine of res judicata is a question of law, which we review de novo. *State v. Richardson*, 2025-Ohio-1818, ¶ 14 (7th Dist.).

{¶22} With the foregoing case law in mind, we address Appellant’s arguments based on the specific evidence challenged.

I **Adult witnesses whose testimony bolstered the victim’s testimony including Lieutenant Marsha Eisenhart, who investigated the victim’s accusations; D.B., the victim’s mother; Anne Eisenhart, a guidance counselor (Marsha’s sister-in-law); and Malmer, and violated the rule against hearsay and the Confrontation Clause.**

{¶23} Appellant challenges the same testimony offered on behalf of the state in his postconviction petition based on the same evidentiary arguments (improper bolstering, hearsay, Confrontation Clause) as he did to no avail in his direct appeal. In order to distinguish his current arguments from his previous arguments and avoid the application of the doctrine of res judicata, he writes:

The transcript shows some symptoms: repeated hearsay, bolstering, no objections, expert or quasi-expert opinions, and lack of limiting instructions. It does not show the facts needed to adjudicate the postconviction claims.

The transcript does not show what counsel advised about appellate rights. It does not reveal attorney-client communications. It does not show whether counsel investigated or consulted experts. It does not reveal whether counsel requested bench notes, worksheets, draft reports, reliance materials, or communications. It does not show what materials the prosecution team possessed, what it disclosed, or what it withheld. *And it does not explain why counsel failed to object to repeated recitations of the allegations before the complaining witness testified.*

(Emphasis added) (Appellant’s Rep. Brf., p. 10).

{¶24} Appellant essentially concedes res judicata applies to the testimony offered by the state’s witnesses in the final sentence of the quoted portion of his reply brief. In the direct appeal, we found “the evidence that Appellant claims his counsel should have objected to was admissible evidence and was not in violation of the Confrontation Clause or the hearsay rule.” *Kidder*, 2025-Ohio-2905, at ¶ 73 (7th Dist.). We reached the same

conclusion regarding the admissibility of Malmer's expert testimony. Consequently, the explanation for trial counsel's failure to object to the challenged testimony is clear from the direct appeal, that is, any objection would have been overruled based on Ohio law. Consequently, we find Appellant's efforts to determine the reason that trial counsel did not object to the challenged testimony or request limiting instructions based on evidence outside the record is unnecessary, as the record establishes the challenged testimony was admissible. Of equal import, to the extent Appellant argues all of the state's witnesses bolstered the victim's testimony (not just Malmer as he argued in his direct appeal), he could have raised the evidentiary challenge in the direct appeal. Accordingly, we find Appellant's arguments based on the testimony of the state's witnesses are procedurally barred by res judicata.

II Testimony of a prior accusation of sexual misconduct, which was substantiated by Children's Services, to which trial counsel did not object to or seek limiting instructions with respect to the foregoing testimony.

{¶25} Appellant's second argument conflates the evidence offered by the state at trial. Lieutenant Eisenhart testified she learned about prior allegations of sexual misconduct by Appellant during her interviews with Appellant's previous wife and his stepdaughter. (Trial Tr., p. 212). However, Lieutenant Eisenhart explained the prior allegations were never reported to law enforcement. (*Id.* at p. 213). Earlier in her testimony, Lieutenant Eisenhart stated the sexual abuse accusations at issue in this appeal were substantiated by Children's Services. (*Id.* at p. 203). Appellant challenges Lieutenant Eisenhart's testimony for the first time in his postconviction petition, however, we find the argument is procedurally barred by res judicata as it could have been raised on direct appeal.

III Trial counsel's failure to investigate or challenge the classification of Malmer as an expert. Trial counsel did not provide any expert reports for Appellant's pre-trial review or discuss a motion to retain an independent medical or psychological expert.

{¶26} Appellant argues the facts in this appeal are similar to the facts in *Bunch*. However, the state did not offer any expert testimony in *Bunch*. Where the state offers expert testimony, Ohio courts frequently reject a petitioner’s argument that his trial counsel provided ineffective assistance because an expert did not testify on behalf of the defense. Ohio courts have reasoned defense counsel may rely on cross-examination of the state’s expert. Here, trial counsel cross-examined Malmer, so to the extent Appellant’s relies on *Bunch*, we find his reliance is misplaced.

{¶27} The facts in this appeal are further distinguishable from the facts in *Bunch*, as Bunch attached the affidavit of an expert on eyewitness testimony to his postconviction petition. The expert averred the eyewitness testimony in *Bunch* was unreliable based on the eyewitness’s reluctance to identify Bunch based on a photograph of his face. Appellant has not offered the affidavit of an expert challenging the reliability of the testimony offered by Malmer.

{¶28} Moreover, the record establishes Malmer’s credentials as an expert in childhood sexual abuse. Malmer was a nurse practitioner and the medical examiner at Akron Children's Hospital at the Child Advocacy Center in Boardman, Ohio since 2016. She received her registered nurse degree in 1993, her master’s degree in 2014, and her doctorate degree of nursing practice with a focus on sexual violence in 2022. At the time of trial, she was pursuing a post-master’s certification for psychiatric mental health nurse practitioner.

{¶29} Malmer had previously worked for Akron Children's Hospital for over 20 years and had performed pediatric sexual assault exams in the emergency department. Malmer was a member of a national professional organization for children of abuse and engaged in continuing education to maintain her membership. She was also employed through Ohio University as an adjunct faculty for population health and had provided expert testimony in child sexual abuse cases in Columbiana, Mahoning, Trumbull, Ashtabula, Mansfield, and Cuyahoga Counties. (Trial Tr., p. 352-355).

{¶30} In addition to the deposition of Appellant’s trial counsel, he sought discovery including trial counsel’s file, expert reports, reliance materials, correspondence, disclosure letters, bench notes/cards, worksheets, drafts, trial-preparation materials, independent expert proof, documentation of plea offers, and an in-camera review of the

state's file. Appellant does not cite to a single case where the foregoing materials were made available to a petitioner in a postconviction proceeding. To the extent Appellant challenges Malmer's classification as an expert witness at trial, his argument is based solely on speculation, which is contradicted by the record. Accordingly, we find Appellant has failed to articulate specific operative facts sufficient to warrant a hearing or limited discovery.

IV An in-camera review of the state's evidence is necessary because the state may have committed *Brady* and *Giglio* violations.

{¶31} We also reject Appellant's argument that the state *may* have concealed favorable evidence, based on *Brady* and *Giglio*, as the argument is wholly speculative. Appellant argues *State v. Bethel*, 2022 Ohio-783, "confirms that [the] *Brady* doctrine does not demand clairvoyance from a defendant attempting to prove suppressed evidence." (Appellant's Rep. Brf., p. 12). Appellant overstates the holding in *Bethel*, which stands for the rule of law that a petitioner is not required to show he could not have discovered suppressed evidence by exercising reasonable diligence. Here, Appellant does not even identify the allegedly suppressed evidence, arguing instead that an in camera review of all of the state's evidence *may* reveal a *Brady* or *Giglio* violation. Accordingly, we find Appellant has failed to articulate specific operative facts sufficient to warrant a hearing or limited discovery.

V Trial counsel informed Appellant that the victim would not testify so Appellant was denied the opportunity to participate in the preparation of questions for cross-examination.

{¶32} Although Appellant asserts a due process violation based on his inability to participate in the preparation of questions for the cross-examination of the victim, he has not articulated any specific facts that he knew during the trial, but trial counsel did not, that would have contradicted the victim's testimony or challenged the victim's credibility. Said facts are solely within Appellant's knowledge but do not appear in his affidavit. In the absence of such evidence, we find Appellant failed to allege sufficient operative facts

to establish substantive grounds for relief and therefore to warrant a hearing or limited discovery.

VI Appellant received ineffective assistance of counsel regarding his appellate rights, as trial counsel failed to provide any instruction regarding Appellant’s right to appeal his conviction and sentence.

{¶33} The trial court reasoned Appellant could not demonstrate he suffered any prejudice as a consequence of trial counsel’s alleged failure to advise Appellant about his appellate rights, because we allowed Appellant to file a delayed appeal. Appellant argues the foregoing conclusion “did not address prejudice tied to delayed review, postconviction timing, counsel consultation, or the sworn allegation that trial counsel told the family to wait until prison transfer before filing.” (Appellant’s Brf., p. 20). However, Appellant in his affidavit failed to specifically articulate any facts, only supposition, that he was prejudiced as a consequence of the delayed appeal. Said facts are solely within Appellant’s knowledge but do not appear in his affidavit. Accordingly, we find Appellant has failed to articulate specific operative facts sufficient to warrant a hearing or limited discovery.

VII Trial counsel failed to provide information regarding plea offers, educate Appellant regarding potential sentences if he went to trial, or suggest a plea without admitting his guilt.

{¶34} The Sixth Amendment right to counsel extends to the plea-bargaining process. *Missouri v. Frye*, 566 U.S. 134 (2012). While engaged in plea bargaining, defendants are “ ‘entitled to the effective assistance of competent counsel.’ ” *Lafler v. Cooper*, 566 U.S. 156, 162 (2012), quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Counsel provides deficient performance where he fails to inform the defendant of a formal plea offer before it expires, *Frey* at 134, or instructs a defendant to reject a plea offer where it would have resulted in lesser sentence, *Lafler* at 164.

{¶35} To satisfy the prejudice requirement in such circumstances, a defendant must show: (1) but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of

intervening circumstances); (2) the court would have accepted its terms; and (3) the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed. *State v. Clay*, 2018-Ohio 985, ¶ 21 (7th Dist.), citing *Lafleur* at 164, *Frye* at 147.

{¶36} Appellant does not contend trial counsel advised him to reject a plea offer or failed to inform him of the existence of a plea offer, but instead trial counsel failed to provide details of the offer or the potential sentence should he proceed to trial. However, Appellant’s averment is contradicted by the record. Appellant was present with trial counsel at the status conference on February 6, 2023, where the state informed the trial court that “defense counsel [had] advised her that his client simply wishes to proceed to trial.” (2/6/23 Conference Tr., p. 2). The state further warranted parties had engaged in “minimal discussions” but no resolution was forthcoming. Defense counsel represented he had discussions with “the State, [his] client, and [his] client’s family” and anticipated proceeding to trial. (*Id.* at p. 3).

{¶37} Appellant was present with trial counsel at the status conference on May 8, 2023, where the state informed the trial court that the parties had “not had much in the way of discussions about resolution of this case. It’s been advised that the Defendant is not interested in any resolution and would intend to proceed to trial.” (5/8/23 Conference Tr., p. 2). Trial counsel responded, “there has been an offer made and discussed with my client. As of right now there is no resolution.” (*Id.*).

{¶38} At the conferences, Appellant did not challenge the representations of trial counsel regarding Appellant’s desire to proceed to a jury trial, nor did he challenge trial counsel’s representation that a plea offer from the state was the subject of more than one discussion with Appellant and his family. Accordingly, we find Appellant’s allegations regarding his lack of awareness of the details of the plea offer is directly contradicted by the record. We further find Appellant has failed to articulate specific operative facts sufficient to warrant a hearing or limited discovery.

{¶39} In summary, “[a] petition presents substantive grounds for relief when it contains allegations that are sufficient to state a constitutional claim and the files and records of the case do not affirmatively disprove the claim.” *State v. Blanton*, 2022-Ohio-3985, ¶ 24, citing *State v. Milanovich*, 42 Ohio St.2d 46, 50 (1975), and R.C. 2953.21(F).

A petitioner is not entitled to a hearing if his claim for relief is belied by the record and is unsupported by any operative facts other than the petitioner's own self-serving affidavit or statements in his petition, which alone are legally insufficient to rebut the record on review. *State v. Kapper*, 5 Ohio St.3d 36, 38 (1983). Accordingly, we find Appellant's affidavit is comprised of unsupported allegations and speculation, and did not state sufficient operative facts to establish substantive grounds for relief as his arguments have been previously addressed in his direct appeal, could have been addressed on direct appeal, or are directly contradicted by the record. We further find Appellant's first, second, and third assignments of error have no merit.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED BY DENYING RELIEF WITHOUT MAKING ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENT FOR MEANINGFUL APPELLATE REVIEW.

{¶40} Appellant contends the trial court's findings of fact and conclusions of law are insufficient. R.C. 2953.21(D) requires the trial court to issue findings of fact and conclusions of law when dismissing a timely petition for postconviction relief. Findings are required " 'to apprise petitioner of the grounds for the judgment of the trial court and to enable the appellate court to properly determine appeals in such a cause.' " *State v. Calhoun*, 86 Ohio St.3d 279, 291 (1999), quoting *Jones v. State*, 8 Ohio St.2d 21, 22 (1966).

{¶41} However, the trial court need not discuss every issue raised or "engage in an elaborate and lengthy discussion in its findings of fact and conclusions of law." *Calhoun* at 291. A trial court issues proper findings of fact and conclusions of law "where such findings are comprehensive and pertinent to the issues presented, where the findings demonstrate the basis for the decision by the trial court and where the findings are supported by the evidence." *Id.* at 292. In *Calhoun*, the Ohio Supreme Court concluded the findings of fact and conclusions of law in a three-page opinion outlining the procedural history of the case, setting forth the appropriate legal standard, and

addressing the defendant's claims "were adequate in conveying to the court of appeals the basis for its decision." *Id.*

{¶42} We reach the same conclusion here. In the seven-and-a-half page judgment entry, the trial court set forth the procedural history of the case, cited the governing law, and addressed each of the six arguments advanced by Appellant. The trial court opined Appellant's ineffective assistance claims and the evidentiary challenges on which they were based (Confrontation Clause, due process, improper vouching) were foreclosed by res judicata. His *Brady* and *Giglio* claims were speculative. Appellant could not demonstrate prejudice resulting from his ineffective assistance claims based on incomplete appellate advice because we granted his motion for a delayed appeal. Cumulative error cannot exist in the absence of harmless error. Finally, the trial court overruled Appellant's motion for a deposition of his trial counsel as the request was not supported by the petition.

{¶43} Therefore, we find the trial court's judgment entry apprised Appellant of the grounds for dismissal and enabled us to determine this appeal. Accordingly, Appellant's fourth assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 5

THE CUMULATIVE EFFECT OF COUNSEL'S FAILURES, MISSING EXPERT MATERIALS, NARRATIVE HEARSAY AND BOLSTERING, AND THE DENIAL OF FACTUAL DEVELOPMENT DEPRIVED [APPELLANT] OF DUE PROCESS AND A MEANINGFUL POSTCONVICTION REMEDY.

{¶44} In *State v. Knight*, 2024-Ohio-2176, 108 (7th Dist.), reconsideration denied, 2024-Ohio-4518 (7th Dist.), appeal not allowed, 2025-Ohio-231, we summarized the doctrine of cumulative error as follows:

Under the doctrine of cumulative error, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v.*

Garner, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). This means that if the court finds various errors to be harmless error, we may reverse based upon the effect of all of these harmless errors together. *State v. Donkers*, 170 Ohio App.3d 509, 2007-Ohio-1557, 867 N.E.2d 903, ¶ 202 (11th Dist.).

Id. at ¶ 108.

{¶45} Multiple Ohio appellate districts have considered cumulative error claims in postconviction petitions and rejected them on the merits because no individual errors were established. The Tenth District in *State v. Jackson*, 2002-Ohio-3330 (10th Dist.) applied the cumulative error standard directly, stating a judgment may be reversed where the cumulative effect of errors deprives a defendant of his constitutional rights, even though the errors singularly do not rise to the level of prejudicial error – but found no cumulative error because no individual errors had been found. The Ninth District in *State v. Phillips*, 2002-Ohio-823 (9th Dist.) similarly held that the failure of the substantive grounds for relief to establish any error precluded any finding of cumulative error. The Second District in *State v. Gapen*, 2005-Ohio-441 (2d Dist.) held that because only one error was found in the trial court's dismissal of the postconviction claims, there could be no cumulative effect.

{¶46} Insofar as we find no harmless error, we find no cumulative error. Accordingly, Appellant's fifth assignment of error has no merit.

CONCLUSION

{¶47} For the foregoing reasons, the March 11, 2026 judgment entry of the Columbiana County Common Pleas Court dismissing Appellant's petition for postconviction relief and overruling his motion for limited discovery is affirmed.

Waite, P.J., concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are 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.