[Cite as *State v. Nitsche*, 2017-Ohio-529.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103174

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LUIS NITSCHE

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-581917-A
Application for Reopening
Motion No. 499585

RELEASE DATE: February 15, 2017

FOR APPELLANT

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EILEEN A. GALLAGHER, J.:

{¶1} Luis Nitsche has filed an application for reopening pursuant to App.R. 26(B). Nitsche is attempting to reopen the appellate judgment, as rendered in *State v. Nitsche*, 8th Dist. Cuyahoga No. 103174, 2016-Ohio-3170, which affirmed his convictions for aggravated murder, attempted murder and aggravated robbery with firearm specifications in connection with the shootings of two separate victims that occurred weeks apart.[1] This court further upheld the trial court's imposition of an aggregate prison sentence of life without the possibility of parole plus 20 years but reversed the restitution order and remanded for the trial court to consider Nitsche's present and future ability to pay restitution. *Id.*

{¶2} The state opposes Nitsche's application on the grounds that it is untimely and has no merit.

{¶3} For the following reasons, we deny the application for reopening.

A. Untimely

{¶4} App.R. 26(B)(1) plainly states that: "An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." Likewise, App.R. 26(B)(2)(b) requires that Nitsche establish "a showing of good cause for untimely filing if the application is filed more than 90 days

[1]On December 23, 2013, Nitsche shot and paralyzed the first victim, Berry Dean, and on January 17, 2015, Nitsche shot and killed the second victim, Lawelden McDowell. The shootings were motivated by Nitsche's belief that these men had begun a relationship with his former girlfriend.

after journalization of the appellate judgment." The Ohio Supreme Court requires intermediate appellate courts to strictly enforce App.R. 26(B)'s 90-day deadline, explaining as follows:

> Consistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the state's legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved.
>
> Ohio and other states "may erect reasonable procedural requirements for triggering the right to an adjudication," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen. * * * The 90-day requirement in the rule is "applicable to all appellants," *State v. Winstead*, 74 Ohio St.3d 277, 278, 658 N.E.2d 722 (1996), and [the applicant] offers no sound reason why he — unlike so many other Ohio criminal defendants — could not comply with that fundamental aspect of the rule.

State v. Gumm, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 7 - 8, ¶ 10. *See also State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Cooey*, 73 Ohio St.3d 411, 653 N.E.2d 252 (1995); and *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995).

{¶5} Nitsche is attempting to reopen the appellate judgment that was journalized on May 26, 2016. His application for reopening, however, was not filed until August 29, 2016 — more than 90 days from the date of journalization. Nitsche contends nonetheless that this court should still consider his application as timely because he submitted his application in the prison mailbox to be sent by ordinary mail on August 19, 2016. He further contends that his application "was due on or about August 26, 2016"

and, therefore, his application is timely. These arguments lack merit and do not constitute "good cause" to support an untimely application.

{¶6} Contrary to Nitsche's assertion, his application was due on August 24, 2016, which is 90 days from the May 26, 2016 journalized-appellate judgment. Under the plain language of App.R. 26(B)(1), we are not free to deem Nitsche's application filed as of the date he mailed it. *See State ex rel. Tyler v. Alexander*, 52 Ohio St.3d 84, 555 N.E.2d 966 (1990) (rejecting the claim that "filed in the court from which the case is appealed" means the same as "delivered to the prison mailroom"); *see also State v. Williams*, 157 Ohio App.3d 374, 2004-Ohio-2857, 811 N.E.2d 561, ¶ 12 (8th Dist.), ("any document is considered filed when it is filed with the clerk of court and not when it is placed in the prison mailing system"). Accordingly, because Nitsche failed to file his application with this court within the 90-day period and fails to show "good cause" for the untimely filing, the application must be denied.

B. Procedurally Defective

{¶7} Aside from the application being untimely, Nitsche failed to attach a sworn statement as required under App.R. 26(B)(2)(d). This provision requires an applicant to include "a sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or agreements raised * * * and the manner in which the deficiency prejudicially affected the outcome of the appeal * * * ." *Id.*

{¶8} At the end of his application, Nitsche attached two statements purporting to comply with App.R. 26(B)(2)(d), but neither statement was notarized. According to his statements, "notary public refused to notarize." This court, however, has consistently held that a statement must be notarized to meet the requirements of App.R. 26(B)(2)(d). *See, e.g., State v. Harrision*, 8th Dist. Cuyahoga No. 93132, 2010-Ohio-2778, *reopening disallowed*, 2011-Ohio-699; *State v. Waller*, 8th Dist. Cuyahoga No. 87279, 2006-Ohio-4891, *reopening disallowed*, 2007-Ohio-6188. As recognized by the Ohio Supreme Court, the sworn statement is mandatory and the failure to include one warrants denial of the application. *State v. Lechner*, 72 Ohio St.3d 374, 650 N.E.2d 449 (1995); *see also State v. Bates*, 8th Dist. Cuyahoga Nos. 97631, 97632, 97633, and 97634, 2012-Ohio-3949, *reopening disallowed*, 2015-Ohio-4176 (applying *Lechner* and recognizing that the sworn statement is mandatory).

C. Arguments Not Meritorious

{¶9} Even if we were to consider Nitsche's application on the merits, the application still fails.

{¶10} "To succeed on an App.R. 26(B) application, a petitioner must establish that counsel's performance fell below an objective standard of reasonable representation and that he was prejudiced by the deficient performance." *State v. Adams*, 146 Ohio St.3d 232, 2016-Ohio-3043, N.E.3d 1227, ¶ 52, 54 citing *State v. Dillon*, 74 Ohio St.3d 166, 171, 657 N.E.2d 273 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373

(1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768. Specifically, Nitsche "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶11} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be "highly deferential." *Id.* at 689. The court further stated that it is all too tempting for a defendant to second-guess counsel's assistance after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, "a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*

{¶12} It is well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Id.* at 754. The United States Supreme Court has upheld the appellate attorney's discretion to decide which issues he or she believes are the most fruitful arguments and "the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.* at 751-752.

{¶13} Because Nitsche cannot establish either prong of the *Strickland* test, his application fails on the merits.

1. Denial of Motion for Mistrial

{¶14} In his first proposed assignment of error, Nitsche contends that his appellate counsel should have challenged the trial court's denial of his motion for a mistrial after the state's witness, Karen Osborn, testified on cross-examination that he (Nitsche) "did another shooting on the west side." Specifically, Nitsche points to the following exchange between his trial counsel and Osborn as grounds for his first proposed assignment of error:

> Q. And did he ever come over to your house and stay the night or take you out on a date to XO or something like that?
>
> A. Never took me on a date. Came over the house and spent the night, yes he did. The night after he did another shooting on the west side, he came over that night.

{¶15} Appellate counsel, however, cannot be ineffective in failing to raise an assignment of error that would fail.

{¶16} The decision whether to grant a mistrial rests within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001); Crim.R. 33. "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened * * *." *State v. Reynolds*, 49 Ohio App.3d 27, 33, 550 N.E.2d 490 (2d Dist.1988). The

granting of a mistrial is necessary only when a fair trial is no longer possible. *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991).

{¶17} The statement at issue was made in response to an open-ended question posed by Nitsche's trial counsel and, therefore, falls under the doctrine of invited error. "A party cannot take advantage of an error he invited or induced." *State v. Seiber*, 56 Ohio St.3d 4, 17, 564 N.E.2d 408 (1990); *see also State v. Beeson*, 2d Dist. Montgomey No. 19312, 2002-Ohio-4341, ¶ 30 (determining trial court appropriately denied defendant's motion for mistrial where the testimony about defendant's prior criminal history "was not elicited by the State" but "was elicited by defendant during cross-examination of the state's witness" and thus was invited error).

{¶18} Contrary to Nitsche's assertion, Osborn's statement did not rise to the level of denying him a fair trial because the case against him involved two separate shootings. Osborn's reference to another shooting was, therefore, consistent with the state's case against Nitsche. Moreover, there was ample evidence at trial to convict Nitsche and Nitsche fails to demonstrate how this single statement prejudiced him such that the jury would not have found him guilty but for this statement. Indeed, in rejecting Nitsche's manifest weight of the evidence challenge, we noted that "there was eyewitness testimony from persons present at the scene identifying Nitsche as the shooter in each of the two incidents" all of whom "knew him well" and "four witnesses * * * testified as to Nitsche's motive for shooting Dean and McDowell." *Nitsche*, 2016-Ohio-3170, ¶ 47.

{¶19} Thus, based on the record, the trial court did not abuse its discretion in denying the motion for mistrial and any challenge on such discretion would have been futile. The first proposed assignment of error is without merit.

2. Right to Cross-Examination

{¶20} In his second proposed assignment of error, Nitsche argues that he was denied his right to cross-examination when the state's witness, Karen Osborn, refused to answer several questions on cross-examination. Although the record reflects that Osborn became irritated and frustrated with Nitsche's trial counsel's questioning on cross-examination, it does not support Nitsche's claim that he was denied his right to cross-examine the witness. To the contrary, his trial counsel effectively cross-examined Osborn, identifying inconsistencies between her statement to the police and her testimony on direct. Notably, while the trial court did order a recess at one point when Osborn indicated that she was "done" testifying, Nitsche's trial counsel neither objected nor raised any concern regarding Nitsche's right to cross-examination being infringed after the questioning resumed. Accordingly, Nitsche cannot demonstrate that his appellate counsel was ineffective in failing to raise a meritless argument.

3. Admission of "Other Acts" Testimony and Curative Instruction

{¶21} In his third proposed assignment of error, Nitsche contends that the trial court erroneously allowed several instances of prejudicial evidence of prior bad acts and committed plain error in failing to give a limiting instruction.

{¶22} To the extent that Nitsche complains of testimony that the trial court ordered stricken, we summarily reject any claim that appellate counsel should have challenged this testimony. Further, the record reflects that the trial court instructed the jury to disregard the statement.

{¶23} As to the other references of alleged prejudicial evidence, Nitsche relies on the same testimony that he identified in support of his first proposed assignment of error, i.e., Osborn's statement referring to "another shooting," as well as Osborn's statement that he turned the gun on her after shooting McDowell. Nitsche further challenges Maryann Jackson's description of their relationship as "crazy" and her statement as to what Nitsche told her over the phone preceding the shooting of Dean that included his calling her "Bitch." These witnesses, however, were testifying firsthand as to their direct interaction and observations of Nitsche. Aside from their testimony being relevant to the state's case, the statements were admissible. Except for Osborn's reference to "another shooting," trial counsel did not object to the other statements that Nitsche now contends should have been challenged by appellate counsel. Although the testimony did not paint a "favorable" picture for Nitsche, that fact does not render it inadmissible under Evid.R. 403. *See State v. Wright*, 48 Ohio St.3d 5, 8, 548 N.E.2d 923 (1990) ("Evid.R. 403 speaks in terms of unfair prejudice. Logically, all evidence presented by a prosecutor is prejudicial, but not all evidence unfairly prejudices a defendant.").

{¶24} Therefore, there is no colorable claim that appellate counsel was ineffective in failing to challenge the admission of testimony that the trial court properly allowed. Nitsche fails to demonstrate any prejudice to satisfy the second prong of the *Strickland* test.

4. Ineffective Assistance of Trial Counsel: Failure to Request a Lesser-Included Offense Instruction

{¶25} In his fourth proposed assignment of error, Nitsche argues that his trial counsel was ineffective in failing to request a jury instruction for a lesser-included offense of voluntary manslaughter with respect to the aggravated murder charge involving McDowell.

{¶26} As noted by the state, voluntary manslaughter is an inferior degree of aggravated murder; it is not a lesser-included offense of aggravated murder. *State v. Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992). R.C. 2903.03(A) defines voluntary manslaughter as knowingly causing the death of another while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force. "If insufficient evidence of provocation is presented, so that no reasonable jury would decide that an actor was reasonably provoked by the victim, the trial court must, as a matter of law, refuse to instruct the jury on voluntary manslaughter." *State v. Bliss*, 10th Dist. Franklin No. 04AP-216, 2015-Ohio-3987, ¶ 39, citing *Shane* at 634.

{¶27} The record is devoid of sufficient evidence to support the mitigating element of provocation contained within the definition of voluntary manslaughter. Trial counsel cannot be deemed ineffective in failing to request an instruction that the trial court would have been required to deny. Nitsche's defense theory at trial relied on the theory that Nitsche did not commit the shooting. Trial counsel cannot be deemed ineffective in failing to pursue an instruction that would have undermined the entire defense theory. Instead, such a decision constitutes sound trial strategy and will not support an ineffective assistance of counsel claim on appeal. *See State v. Lewis*, 8th Dist. Cuyahoga No. 95964, 2011-Ohio-6155, ¶ 45 (rejecting an ineffective assistance of counsel claim for failing to request a jury instruction with regard to the offense of voluntary manslaughter when defendant's trial strategy involved a complete denial of any criminal activity).

{¶28} As this assignment of error has no merit, appellate counsel was not ineffective in failing to pursue it.

5. Pretrial Identification

{¶29} In his fifth proposed assignment of error, Nitsche argues that appellate counsel should have challenged Osborn's pretrial identification because the identification was based on a single photograph. According to Nitsche, the identification procedure was "extremely suggestive and violated his due process rights." Any challenge of Osborn's pretrial identification as being tainted by a single photograph would have been futile. Osborn knew Nitsche and identified him by his nickname prior to seeing the photograph. There was no issue as to a substantial likelihood of irreparable

misidentification based on the showing of the photograph. *See State v. Parker*, 53 Ohio St.3d 82, 87, 558 N.E.2d 1164 (1990) ("An unnecessarily suggestive identification process does not violate due process [if] such identification possesses sufficient indicia of reliability."); *see also State v. Huff*, 145 Ohio App.3d 555, 763 N.E.2d 695 (1st Dist.2001) (recognizing that a strong showing of reliability can arise from the fact that a victim knew the perpetrator of a crime before the crime was committed).

{¶30} We find no merit to Nitsche's proposed fifth assignment of error.

6. Sentence

{¶31} In his sixth proposed assignment of error, Nitsche contends that appellant's counsel was ineffective in failing to challenge the trial court's act of construing his silence during sentencing against him. Specifically, he challenges the trial court's finding that he had "no remorse" as a result of his decision not to say anything at sentencing. This argument lacks merit.

{¶32} Ohio courts, including this court, have consistently held that a defendant's silence at sentencing may not be used against him in fashioning a sentence. *State v. Betts*, 8th Dist. Cuyahoga No. 88607, 2007-Ohio-5533, ¶ 29. However, lack of remorse is a sentencing factor under R.C. 2929.12(D)(5). Even where a defendant does not speak at sentencing, the court's statement that the defendant demonstrated a lack of remorse and an unwillingness to take responsibility does not demonstrate that a court's sentencing decision is based upon the silence but shows only that the court was considering the statutory sentencing factors. *State v. Hodges*, 8th Dist. Cuyahoga No. 101145,

2014-Ohio-4690, ¶ 11, citing *State v. Clunen*, 7th Dist. Columbiana No. 12 CO 30, 2013-Ohio-5525, ¶ 21; *State v. Moore*, 11th Dist. Geauga No. 2011-G-3027, 2012-Ohio-3885, ¶ 47.

{¶33} This proposed assignment of error is not well taken.

7. Allied Offenses

{¶34} Nitsche argues in his seventh and final proposed assignment of error that his appellate counsel was ineffective in failing to challenge his convictions related to the first victim, Dean. He contends that the trial court improperly sentenced him separately and consecutively for the offenses of aggravated robbery, felonious assault and attempted murder, which he argues should have merged as allied offenses. Nitsche, however, fails to present a colorable claim of ineffective assistance of appellate counsel on this ground.

{¶35} Contrary to Nitsche's assertion, the trial court merged the offenses of felonious assault and attempted murder and the state elected to proceed on the attempted murder count at sentencing. While the trial court refused to merge the aggravated robbery count with the attempted murder count, the record revealed that the aggravated robbery was committed with a separate animus and not subject to merger. *See State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraph three of the syllabus ("Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if * * * the conduct shows that the offenses were committed with separate animus."); *see also State v. Williams*, 1st Dist. Hamilton No. C-150249, 2016-Ohio-5827, ¶ 75 - 76 (recognizing that an aggravated murder and aggravated

robbery charge did not merge where the manner in which the defendant killed his victim evidenced a specific intent to kill, separate and apart from the motive to rob him). Indeed, as argued by the prosecutor at Nitsche's sentencing hearing, Nitsche's act of shooting Dean with an intent to kill carried a separate motive from his robbery of Dean.

{¶36} Based on the record in this case — where the issue of merger was raised in the trial court, and rejected, based on the prosecutor's proffer of different animuses — this court will not second-guess an appellate counsel's exercise of professional judgment in choosing not to raise an allied offenses argument. *See State v. Minifee*, 8th Dist. Cuyahoga No. 99202, 2014-Ohio-694, ¶ 14.

{¶37} In conclusion, because Nitsche's application was procedurally defective and filed untimely without good cause and because Nitsche failed to demonstrate a genuine issue that he was deprived effective assistance of appellate counsel, his application for reopening under App.R. 26(B) fails on multiple grounds.

{¶38} The application for reopening is denied.

EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., and
ANITA LASTER MAYS, J., CONCUR