[Cite as *State v. Henderson*, 2018-Ohio-5123.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ERICULO LAROSS HENDERSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 15 MA 0137

Application for Reopening

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Denied.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant Prosecutor, Mahoning County Prosecutor's Office, 21 W. Boardman Street., 6th Floor., Youngstown, Ohio 44503, For Plaintiff-Appellee and

Ericulo Laross Henderson, pro se, Inmate No. A672536, Southeastern Correctional Institution, 5900 BIS Road, S.W., Lancaster, Ohio 43130, for Defendant-Appellant.

Dated: November 30, 2018

PER CURIAM.

{¶1} Defendant-Appellant Ericulo Henderson has filed an application for reopening of his convictions of second-degree felonious assault and second and third-degree felony child endangering. *State v. Henderson*, 7th Dist. No. 15 MA 137, 2018-Ohio-2816.

{¶2} An application to reopen an appeal must be filed "within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." App.R. 26(B). Our judgment in this case was journalized on June 29, 2018. Appellant filed this application on September 24, 2018. Thus, it was timely filed.

{¶3} An application for reopening, pursuant to App.R. 26(B), provides a means to raise an ineffective assistance of appellate counsel claim in a criminal appeal. "An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). The analysis set forth in the United States Supreme Court decision *Strickland v. Washington* for ineffective assistance of counsel is the appropriate standard to assess whether Appellant has raised a "genuine issue" as to the ineffectiveness of appellate counsel in his request to reopen under App.R. 26(B)(5). *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶4} The standard for ineffective assistance of counsel is a two-part test where both prongs must be met: deficient performance and resulting prejudice. *State v. Tenace*, 109 Ohio St.3d 451, 2006–Ohio–2987, 849 N.E.2d 1, ¶ 5, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, (1984). *See also State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (if the performance was not deficient, then there is no need to review for prejudice and vice versa). Appellant must show that counsel's performance was so deficient that it fell below an objective standard of reasonableness and, but for this substandard representation, the outcome of the case would have been different. *Strickland* at 687.

{¶5} Appellant asserts appellate counsel was ineffective for failing to raise the following three assignments of error:

"Trial counsel erred to the prejudice of Appellant and was deficient for failing to assure that the indictment adequately set forth the requirements for alleging in loco parentis status."

"Trial counsel erred to the prejudice of the Appellant by failing to provide proper Jury Instructions on teacher immunity alleging 'in loco parentis' status, in the indictment."

"Defendant-Appellant asserts that his conviction was not supported by sufficient evidence and/or against the manifest weight of the evidence in light of his claim that his actions constituted reasonable parental (in loco parentis) discipline under the circumstances."

{¶6} All three assignments of error concern the in loco parentis element of R.C. 2919.22(A)(E)(1)(2)(c), third-degree felony child endangering. Section (A) of that statute provides, "No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support." Appellant contends that the only way he could have been found guilty of this section was if it was determined he was a person in loco parentis and merely being a tutor for the child was not sufficient to render him in loco parentis.

{¶7} The arguments Appellant presents concern the indictment not setting forth the in loco parentis status, the jury not being adequately instructed on the in loco parentis element, and there was not sufficient evidence and/or the conviction was against the manifest weight of the evidence because the evidence did not and could not establish he was in loco parentis to the victim. Appellant's arguments may have merit; however, any error resulting from these failures only amounts to harmless error.

{¶8} Appellant was found guilty of second-degree felonious assault in violation of R.C. 2903.11(A)(1)(D), second-degree felony child endangering in violation of R.C. 2919.22(B)(3)(E)(1)(3) and third-degree felony child endangering in violation of R.C. 2919.22(A)(E)(1)(2)(c). The parties agreed the offenses were allied offenses of similar import and the verdicts merged. The state elected to have Appellant sentenced on the second-degree felony child endangering verdict. Second-degree felony child

endangering in violation of R.C. 2919.22(B)(3) states no person shall administer corporal punishment to a child under the age of 18 that is excessive under the circumstances and creates a substantial risk of serious physical harm to the child. In loco parentis is not an element of this offense. In the direct appeal, this court reviewed whether there was sufficient evidence to prove this offense and determined there was sufficient evidence that the corporal punishment was excessive and created a substantial risk of serious physical harm to the child. *Henderson*, 7th Dist. No. 15 MA 137, 2018-Ohio-2816, ¶ 10-38.

{¶9} Courts have held, in merged offense cases, where there is sufficient evidence supporting the conviction of the state's elected offense for sentencing, it is harmless error if there was insufficient evidence to support the offenses that merged with the elected offense. *State v. Worley*, 8th Dist. No. 103105, 2016–Ohio–2722, ¶ 23, citing *State v. Powell*, 49 Ohio St.3d 255, 263, 552 N.E.2d 191 (1990) (Even if evidence of kidnapping by restraint was insufficient to support conviction, the fact that the kidnapping by removal was based on sufficient evidence and merged with the kidnapping by restraint count means any error with the conviction was harmless beyond a reasonable doubt.); *State v. Croom*, 7th Dist. No. 12 MA 54, 2013–Ohio–5682, ¶ 60-61 ("The Supreme Court has concluded that, even if there is insufficient evidence to support one count, where that count has been merged with another count, the error in rendering a verdict on that count is harmless beyond a reasonable doubt."), citing *Powell*; *State v. Washington*, 10th Dist. No. 09AP–424, 2009–Ohio-6665, ¶ 18 (court is not required to address appellant's sufficiency of the evidence challenge to the kidnapping offenses because the trial court merged those offenses into others). That reasoning also applies to the indictment issue, jury instruction issue and manifest weight argument. *State v. Springer*, 8th Dist. No. 104649, 2017-Ohio-8861, ¶ 15 (manifest weight); *State v. Ramos*, 8th Dist. No. 103596, 2016-Ohio-7685, ¶ 14 (holding that when counts in an indictment are allied offenses and there is sufficient evidence to support the offense on which the state elects to have the defendant sentenced, the appellate court need not consider the sufficiency of the evidence on the count that is subject to merger because any error would be harmless); *State v. Franks*, 8th Dist. No. 103682, 2016-Ohio-5241, ¶ 18 (jury instructions). Therefore, any error regarding the in

loco parentis status for a third-degree felony child endangering guilty verdict is harmless beyond a reasonable doubt. On that basis Appellant cannot satisfy the prejudice prong of the ineffective assistance of appellate counsel test; Appellant cannot demonstrate the outcome of the case would have been different.

{¶10} Appellant's application for reopening is denied.

Presiding Judge Carol Ann Robb

Judge Gene Donofrio

Judge Cheryl L. Waite

NOTICE TO COUNSEL

This document constitutes a final judgment entry.