[Cite as *State v. Griffin*, 2018-Ohio-251.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO,<br><br>PLAINTIFF-APPELLEE,<br><br>VS.<br><br>BRIAN C. GRIFFIN,<br><br>DEFENDANT-APPELLANT. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | CASE NO. 16 MA 0029<br><br><br><br>OPINION AND<br>JUDGMENT ENTRY |

CHARACTER OF PROCEEDINGS: Application for Reopening

JUDGMENT: Denied.

APPEARANCES:

For Plaintiff-Appellee:
Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
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For Defendant-Appellant:
Brian C. Griffin, *pro se*
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JUDGES:
Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: January 19, 2018

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PER CURIAM.

**{¶1}** Defendant-Appellant Brian C. Griffin has filed a timely application to reopen the direct appeal from his criminal conviction. Appellant sets forth six proposed assignments of error he claims appellate counsel should have raised. For the following reasons, the application is denied.

**{¶2}** A jury found Appellant guilty of eight counts of rape of a child under age ten. He was also found guilty of eight counts of gross sexual imposition, which merged with the rape counts at sentencing. Appellant filed a timely appeal from the March 8, 2016 amended sentencing entry. His first assignment of error addressed the manifest weight of the evidence, which this court overruled. *State v. Griffin*, 7th Dist. No. 16MA29, 2017-Ohio-7796, ¶ 12-21. His second assignment of error alleged the trial court erred in excluding evidence about an accusation against the victim's grandfather by another family member, which this court also overruled. *Id.* at ¶ 22-30.

**{¶3}** On December 11, 2007, Appellant filed a timely application to reopen our September 20, 2017 decision. A criminal defendant may apply for reopening of an appeal from the judgment of conviction and sentence based on a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1). The application for reopening must contain: "One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c).

**{¶4}** The application must demonstrate 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 inquiry utilizes the standard two-part test for ineffective assistance of counsel where both prongs must be met: deficient performance and resulting prejudice. *See 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, 80 L.Ed.2d 674 (1984); App.R. 26(B)(2)(d). *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).

**{¶5}** In evaluating an alleged deficiency in performance, an appellate court's review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142–143, 538 N.E.2d 373 (1989), citing *Strickland*, 466 U.S. at 689. *See also State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995) (a court should not second-guess the strategic decisions of counsel). Instances of debatable strategy very rarely constitute ineffective assistance of counsel. *See State v. Thompson*, 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987). There are "countless ways to provide effective assistance in any given case." *Bradley*, 42 Ohio St.3d at 142, citing *Strickland*, 466 U.S. at 689.

**{¶6}** On the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceeding would have been different. *Carter*, 72 Ohio St.3d at 558. Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d 136 at fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding was fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

**{¶7}** Appellant proposes six assignments of error he claims appellate counsel should have briefed. First, he alleges: "Appellant's sentence is contrary to law." In the sentencing entry, the trial court recited the jury's guilty verdict on eight counts of rape of a child under age 10, citing "R.C. 2907.02(A)(1)(b),(B), a Felony/Life." The court then sentenced Appellant to life on each of these rape counts. Five of the life sentences were ordered to run consecutively, and three were ordered to run concurrently. Appellant contends the trial court disregarded the statutory sentencing requirements by phrasing his sentence as a "life" sentence

instead of stating his sentence was "a minimum term of fifteen years and a maximum of life imprisonment," quoting R.C. 2971.03(B)(1)(b).

**{¶8}** Rape in violation of R.C. 2907.02(A)(1)(b) involves sexual conduct with a child under 13. Division (B) then provides: "Except as otherwise provided in this division, notwithstanding sections 2929.11 to 2929.14 of the Revised Code, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code." R.C. 2907.02(B) (however, "if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, the court may impose upon the offender a term of life without parole"). The state sought, but the court did not choose, this life without parole option for rape of a child under 10. Instead, the court chose the life option in R.C. 2907.02(B), which refers the court to R.C. 2971.03. Pursuant to R.C. 2971.03(B)(1),

> if a person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after January 2, 2007, if division (A) of this section[1] does not apply regarding the person, and if the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code, the court shall impose upon the person an indefinite prison term consisting of one of the following: * * * (b) If the victim was less than ten years of age, a minimum term of fifteen years and a maximum of life imprisonment.[2]

**{¶9}** Although Appellant concludes he was prejudiced by the failure to set forth the minimum indefinite sentence for parole eligibility, he does not explain how

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[1] Division (A) of R.C. 2971.03 deals with sexually violent predator specifications.

[2] The court shall impose a minimum term of 25 years and a maximum of life imprisonment if: the offender purposely compels the victim to submit by force or threat of force; the offender has a prior conviction under R.C. 2907.02(A)(1)(b) (or equivalent statute); or the offender during or immediately after the offense caused the victim serious physical harm. R.C. 2971.03(B)(1)(c).

he was prejudiced. In fact, he submits his sentencing information sheet from the Ohio Department of Rehabilitation and Correction showing his net sentence is "75.00-LIFE." This reflects the minimum sentence of fifteen years on the five consecutive life sentences (75) and the maximum sentence of life imprisonment, the sentence to which he claims entitlement. Likewise, Ohio Administrative Code 5120-2-10(Q) instructs the Department of Rehabilitation and Correction, "A prisoner serving a sentence of imprisonment for life imposed pursuant to division (B) of section 2907.02 of the Revised Code and division (B)(1)(b) of section 2971.03 of the Revised Code for the crime of rape against a child under the age of ten, committed on or after January 2, 2007: (1) Becomes eligible for parole consideration after serving: (a) Fifteen full years * * *." O.A.C. 5120-2-10(Q)(1)(a).

**{¶10}** Regardless, counsel's decision to refrain from addressing this issue may have been tactical to avoid a greater prejudice due to other language in R.C. 2971.03 concerning the life sentences on three of the rape counts. For instance, division (E) provides in part: "All minimum terms imposed upon the offender pursuant to division (A)(3) or (B) of this section for those offenses shall be aggregated and served consecutively, as if they were a single minimum term imposed under that division." R.C. 2971.03(E). Accordingly, there is no genuine issue as to ineffective assistance of appellate counsel on the failure to seek more specificity on this topic.

**{¶11}** The second proposed assignment of error contends: "The prosecutor engaged in misconduct and deprived Appellant of a fair trial by vouching for the credibility of Mya Griffin, the state's primary witness, by arguing facts that were not in evidence." Rape involves sexual conduct. R.C. 2907.02. Included within the definition of "sexual conduct" is "cunnilingus." R.C. 2907.01(A). The nurse practitioner testified she heard the victim disclose during an interview that Appellant "would rub her vagina with his fingers, lick her vagina, and he put his tongue in her vagina." (Tr. 333-335). The child testified Appellant would touch her vagina with his fingers and his tongue. (Tr. 281). Appellant complains the prosecutor's closing argument stated Appellant "licked" the child's vagina and improperly suggested this terminology came from the child's testimony. As the state responds, a prosecutor

has latitude in summation and can properly comment on reasonable inferences that can be drawn from the evidence presented at trial. *See, e.g., State v. Treesh*, 90 Ohio St.3d 460, 466, 2001-Ohio-4, 739 N.E.2d 749. Counsel's failure to raise an issue with prosecutor's use of the word "lick" and the related summation was not deficient performance or prejudicial.

**{¶12}** Appellant combines his third and fourth proposed assignments of error as follows: "A conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment; and Trial counsel denied Appellant the right of cross-examination secured by the 6th Amendment Confrontation Clause." Appellant claims the nurse practitioner presented false testimony. He compares her testimony that the child said Appellant would "lick her vagina, and he put his tongue in her vagina" with a statement in a progress note that the child "denies penetration." First, we note the nurse practitioner was taking notes from a medical perspective, not a legal perspective. Second, Appellant incorrectly alleges the nurse practitioner's testimony contradicted her note, which he attached to his application and which was an exhibit at trial. This note said the child reported: he would touch her "down there" with his fingers, tongue, and hand; he "rubbed his hands on her private and used to lick her private with his tongue"; *and* "He rubbed his fingers on her private and licked her private with his tongue. *He put his tongue inside there (vagina).*" (Emphasis added.) A nurse practitioner's statement that a child denied penetration while saying the child reported Appellant put his tongue inside her vagina is not evidence of perjury as Appellant contends. In any event, rape involves sexual conduct, which includes not only acts of vaginal or anal penetration but also fellatio and cunnilingus. *Id.* at ¶ 13, citing R.C. 2907.01(A). "Penetration is not required to commit cunnilingus. Rather, the act of cunnilingus is completed by the placing of one's mouth on the female's genitals." *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 86.

**{¶13}** Next, Appellant believes it was significant that the caseworker who interviewed the child did not testify about the precise sexual conduct related by the

nurse practitioner. However, the state was avoiding the situation of two witnesses presenting the same testimony under the same hearsay exception where only one was providing medical treatment. *See* Evid.R. 803(4) (statement for the purpose of medical diagnosis or treatment). It was the nurse practitioner who testified she was collecting information as part of the medical history and as a guide for her decision as to what procedures and tests to implement (as she listened to the child while the child spoke to the caseworker). *See Griffin*, 7th Dist. No. 16 MA 0029 at ¶ 7.

**{¶14}** Appellant further complains counsel deprived him of his confrontation rights and his right to effective assistance of counsel by failing to cross-examine the nurse practitioner. However, a genuine issue as to prejudice has not been established. Furthermore, the decision not to cross-examine the medical examiner was counsel's tactical decision. Defense counsel need not cross-examine every witness; "[t]he strategic decision not to cross-examine witnesses is firmly committed to the trial counsel's judgment * * *." *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 272, quoting *State v. Otte*, 74 Ohio St.3d 555, 565, 660 N.E.2d 711 (1996).

**{¶15}** Finally, Appellant combines his fifth and sixth proposed assignments of error as follows: "A Jury instruction for Gross Sexual Imposition pursuant to R.C. 2907.05(B), must also include an instruction on the aggravated circumstance element that the other person is less than twelve years of age; and The verdict forms are deficient where they do not specify the level of the charged offense as a felony of the third degree." Contrary to the first part of this argument, the pages of transcript attached to Appellant's application for reopening show the following jury instruction on the gross sexual imposition counts: "you must find beyond a reasonable doubt that on or about February 1, 2012, and May 31, 2013, and in Mahoning County, the defendant did knowingly touch the genitalia of [the child] when the touching was not through clothing, and [the child] was less than 12 years of age, whether or not the defendant knew the age of such person, and the touching was done with an intent to abuse, humiliate, harass, degrade, or arouse, or gratify the sexual desire of any person." (Tr. 416). *See* R.C. 2907.05(B).

**{¶16}** As for the verdict forms on gross sexual imposition, Appellant complains they show the jury found him guilty of "Gross Sexual Imposition, as charged in the Indictment" without either specifying the child was under 12 or the degree of the offense. He concludes the verdicts on the gross sexual imposition counts must be construed as fourth-degree felonies rather than third-degree felonies due to R.C. 2945.75(A)(2), which provides: "When the presence of one or more additional elements makes an offense one of more serious degree: * * * A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

**{¶17}** The state responds: a violation of R.C. 2907.05(B) is a felony of the third degree; the victim being a child under age 12 is an essential element of the offense; and there were no "additional elements" which enhanced the degree of the offense, citing *Hasenyager*. In that case, the Ninth District found gross sexual imposition under R.C. 2907.05(A)(4) (child under 13) was defined as a third-degree felony which was not enhanced by an additional element. *See State v. Hasenyager*, 9th Dist. No. 27756, 2016-Ohio-3540, 67 N.E.3d 132, ¶ 25 (appeal not allowed in 147 Ohio St.3d 1474, 2016-Ohio-8438, 65 N.E.3d 778), distinguishing *State v. McDonald*, 137 Ohio St.3d 517, 2013-Ohio-5042, 1 N.E.3d 374 (where offense of failure to comply with a police officer was defined in one division of a statute and then an additional element was defined in a subsequent division which raised the degree of the offense if there was a substantial risk of serious harm) and *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735 (where offense of tampering with records was defined in one division of a statute and then an additional element was defined in a subsequent division which raised the degree of the offense where the records belonged to a government entity). *See also State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891, ¶ 13-15, 19 (no plain error where jury verdict found the defendant guilty of "Possession of Drugs * * * as charged in Count Two of the indictment" which charged possession of cocaine; possession of cocaine is a

"separate offense" from possession of other drugs and is not an enhancing element; only enhancement would be the amount of cocaine).

**{¶18}** Additionally, we note the date range for the rape counts was the same as the date range for the gross sexual imposition counts; the victim was eight and nine years old during this period. An additional finding the child was under 10 at the time of the offense was attached to the jury verdict for each of the rape counts. In any event, an issue with an offense can be harmless or moot on appeal where the offense was merged and no sentence was issued on the offense. *See, e.g., State v. Lee,* 1st Dist. No. C-160294, 2017-Ohio-7377, fn. 1 (court refused to address the issue defendant raised as to the robbery count where it had been merged with an aggravated robbery count); *State v. Hooks*, 2d Dist. No. CA 16978 (Oct. 30, 1998) (any error in the guilty verdicts for felony murder was rendered harmless by the merger of those charges, and thus, the failure to object to the verdicts did not result in ineffective assistance of counsel). Since the gross sexual imposition counts were merged with the rape counts prior to the imposition of sentence and no sentence was entered on the gross sexual imposition counts, appellate counsel's failure to brief an issue with the verdict forms for gross sexual imposition was not deficient performance or prejudicial where the rape counts are upheld.

Robb, P.J. concurs.

Donofrio, J., concurs.

Waite, J., concurs.