[Cite as *State v. Hackett,* 2019-Ohio-3726.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff- Appellee,

v.

DAVID HACKETT,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0106

Motion to Reopen

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

JUDGMENT:
Affirmed, in part; Remand, in part.

Atty. Paul J. Gains, Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

David Hackett pro se, #700-431, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, Ohio 44430 for Defendant-Appellant

Dated: September 4, 2019

PER CURIAM.

{¶1} Applicant, David Hackett, timely seeks to reopen his appeal in *State v. Hackett*, 7th Dist. Mahoning No. 17 MA 106, 2019-Ohio-1091, claiming appellate counsel was ineffective. The application is denied; Applicant does not present a colorable claim of ineffective assistance of appellate counsel. However, the trial court imposed the incorrect term of post release control in the judgment entry of conviction. This court orders the trial court to issue a nunc pro tunc entry reflecting the correct term.

Facts and Procedural History

{¶2} Applicant was charged and convicted of aggravated murder, rape, kidnapping, and a repeat violent offender specification. *Id*. He was sentenced to life without parole for aggravated murder and eleven years for rape. *Id*. at ¶ 22. The kidnapping conviction merged with the aggravated murder conviction. *Id*.

{¶3} On appeal, Applicant asserted he did not voluntarily, knowingly, or intelligently waive his right to counsel, the role of stand-by counsel was incorrectly limited, the convictions for rape and kidnapping were based on insufficient evidence and/or were against the manifest weight of the evidence, and the jury instruction on kidnapping constituted plain error. We found no merit with any of the arguments asserted and affirmed the convictions. *Id*.

{¶4} Applicant filed this timely application for reopening within ninety days of the journalization of our decision. He asserts appellate counsel was ineffective for the following six reasons: 1) Counsel did not adequately argue and support the third and fourth assignments of error in the direct appeal; 2) Counsel did not assert that the trial court gave an improper instruction on aggravated murder; 3) Counsel did not argue Applicant's conviction for aggravated murder was supported by insufficient evidence and/or against the manifest weight of the evidence; 4) Counsel failed to argue the convictions for rape and kidnapping should have merged; 5) Counsel failed to argue the trial court erred by imposing a three year term of postrelease control as part of Applicant's sentence; and 6) Counsel failed to argue the trial court erred by failing to appoint a private investigator rather than allow Applicant to hire his own with funds allocated by the court.

{¶5} The second through sixth arguments have proposed assignments of error. The first argument does not. Each argument will be addressed in turn.

Law and Analysis

{¶6} App.R. 26(B) provides a means for a criminal defendant to reopen a direct appeal based on a claim of ineffective assistance of appellate counsel. A defendant must establish a colorable claim of ineffective assistance of appellate counsel in order to prevail on an application for reopening. *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, 766 N.E.2d 588, ¶ 7, citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998). The test for ineffective assistance of counsel requires a defendant to prove (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). Under this test, a criminal defendant seeking to reopen an appeal must demonstrate that appellate counsel was deficient for failing to raise the issue presented in the application for reopening and that there was a reasonable probability of success had that issue been raised on appeal. *Spivey* at 25.

{¶7} Applicant represented himself at trial. Consequently, on appeal appellate counsel could not raise any claim that Applicant received ineffective assistance of trial counsel; self-representation waives that argument. Furthermore, if Applicant did not object to any claimed errors, he waived all but plain error. Civ.R. 52. Many of the arguments presented in this reopening application allege errors where no objection was lodged. An alleged error is "plain error" only if error is obvious. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). An appellate court will reverse in a plain error review only if, "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long,* 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus. Arguments not raised to the trial court and reviewed under plain error by the appellate court will only be noticed "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at 97. Consequently, showing ineffective assistance of appellate counsel for failing to raise issues that can only be reviewed under a plain error analysis is a stringent standard to overcome.

I. First Argument – Assignments of Error Three and Fourth in the Direct Appeal

{¶8} Applicant contends trial counsel was ineffective on appeal because counsel did not adequately support the claims made under the third and fourth assignments.

{¶9} Under App.R. 26(B), an applicant must set forth "[o]ne 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).

{¶10} The arguments raised in Applicant's first argument solely address the arguments raised in the direct appeal under the Third and Fourth Assignments of Error. Those assignments of error addressed the rape and kidnapping convictions. *Hackett*, 2019-Ohio-1091 at ¶ 63-92. The arguments raised in the direct appeal were whether the state produced sufficient evidence for those convictions and whether the convictions were supported by the manifest weight of the evidence. *Id*.

{¶11} Applicant has not presented this court with a new assignment of error for these issues. Furthermore, the arguments Applicant raises in the Application for Reopening were considered and addressed by this court in the direct appeal; the analysis is 30 paragraphs and over 10 pages in length. Therefore, arguments made under the Third and Fourth assignments of error provide no basis for reopening the appeal.

II. Second Argument – Jury Instruction on Aggravated Murder

Proposed Assignment of Error

"Hackett's right to Due Process and a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section § 10 of the Ohio Constitution, were violated when the trial court provided improper instructions to the jury regarding the Count One charge of aggravated murder."

{¶12} Applicant argues the trial court incorrectly instructed on aggravated murder and kidnapping. Specifically, he contends the trial court's instruction was circular. Applicant argues the trial court indicated that in order for him to be found guilty of murder he had to first be found guilty of kidnapping and then also instructed that to be found guilty of kidnapping he had to first be found guilty of murder. Applicant also contends the instruction on murder should not have occurred first because after finding him guilty of aggravated murder based on either the felony of kidnapping or rape, the jury had no choice but to find him guilty of kidnapping or rape.

{¶13} There was no objection to the aggravated murder instruction at trial. Therefore, Applicant's argument in the reopening application is that appellate counsel

was ineffective for failing to argue the jury instruction amounted to plain error. In arguing the jury instruction was circular, Applicant only cites portions of the jury instruction. We have previously explained that jury instructions must be read as a whole; "When reviewing the trial court's jury instructions, we must view the instructions in their totality, if the law is clearly and fairly expressed, a reviewing court should not reverse a judgment." *State v. Levonyak*, 7th Dist. Mahoning No. 05 MA 227, 2007–Ohio–5044, ¶ 53. "The jury instructions must be considered as a whole and a single portion of the instruction should not be viewed in isolation." *Id.*

{¶14} In reading the jury instruction as a whole, the trial court correctly instructed on aggravated murder. It stated kidnapping or rape was a required element of aggravated murder; "It is not necessary that the State of Ohio prove the elements of both rape and kidnapping. However, the State of Ohio must prove all the essential elements of either rape or kidnapping in your deliberations as to Count One, aggravated murder." Trial Tr. 836. This is an accurate instruction for aggravated murder as defined in R.C. 2903.01(B); either a kidnapping offense or a rape offense could constitute the predicate offense for the murder. Finding Applicant guilty of R.C. 2903.01(B) murder based on kidnapping does mean that the jury had to find Applicant committed the kidnapping.

{¶15} However, finding Applicant guilty of the kidnapping does not automatically mean the jury had to find Applicant guilty of the R.C. 2903.01(B) aggravated murder. During the instructions, the court indicated Applicant was indicted for two counts of kidnapping and was found guilty of both. During the jury instructions the trial court defined both kidnapping charges – R.C. 2905.01(A)(2) and (4). Under (A)(4) the kidnapping is done with the purpose to engage in sexual activity against the victim's will. Trial Tr. 836. Under (A)(2) the kidnapping must be done with the purpose to either facilitate the commission of any felony or flight thereafter. Trial Tr. 833. During the instruction the trial court defined facilitate as helping, promoting, assisting or aiding, and indicated aggravated murder and murder are felonies. Trial Tr. 835.

{¶16} The trial court was correct that murder can constitute the element of facilitating the commission of a felony for kidnapping under R.C. 2905.01(A)(2). *State v. Cargle*, 2d Dist. Montgomery No. 28044, 2019-Ohio-1544, ¶ 50. As the Second Appellate District correctly noted, ""[T]he kidnapping statute [R.C. 2905.01(A)(2)] does not require that the perpetrator commit the predicate felony; it requires only that the victim be

restrained or removed to facilitate its commission." *Id*. quoting *State v. Rice*, 1st Dist. Hamilton No. C-080444, 2009-Ohio-1080, ¶ 17. Considering the instruction given by the trial court there was no error in the instruction; the trial court did not instruct the jury that it had to find Applicant guilty of murder if it found him guilty of kidnapping.

{¶17} Furthermore, even if the instruction on kidnapping was somehow incorrect for the reasons Applicant asserts, any error is harmless. The kidnapping charges merged into the aggravated murder conviction and the instruction on the aggravated murder charge was correct. Any alleged errors in the instruction for the merged offense are harmless if the instruction on the offense it was merged with is correct. *State v. Henderson*, 7th Dist. Mahoning No. 15 MA 0137, 2018-Ohio-5123, ¶ 9, citing *State v. Franks*, 8th Dist. Cuyahoga No. 103682, 2016-Ohio-5241, ¶ 18.

{¶18} Applicant also complains about the order of the instruction. He asserts the trial court should have instructed on rape and kidnapping first and then on aggravated murder. This argument lacks merit. Since the entire jury instruction on rape, kidnapping, and aggravated murder was correct, the order in which the instructions were given would at most amount to harmless error.

{¶19} This proposed assignment of error does not present a colorable claim of ineffective assistance of counsel.

III. Third Argument – Aggravated Murder Sufficient Evidence

Proposed Assignment of Error

"Hackett's conviction for aggravated murder is against the sufficiency of evidence and the manifest weight of evidence, in violation of his Due Process protections under the Fourteenth Amendment to the U.S. Constitution and Article I, Section § 10 of the Ohio Constitution."

{¶20} Appellant contends appellate counsel should have presented an argument that his conviction for aggravated murder was not supported by sufficient evidence and/or was against the manifest weight of the evidence.

{¶21} This argument is partially based upon the assertion that the appeal must be reopened on Applicant's first argument that appellate counsel did not adequately argue the sufficiency/manifest weight arguments for rape and kidnapping. There is no merit with his first argument in this application and thus, no merit with this argument.

{¶22} Applicant also appears to be arguing regardless of the rape and kidnapping convictions there was insufficient evidence and/or the conviction for aggravated murder was against the manifest weight of the evidence. He indicates that while there is no dispute that the victim was stabbed 81 times and a knife was recovered from the scene, his DNA was not found on the knife and he cooperated with the investigation and even identified the victim.

{¶23} As explained in the opinion, the knife recovered from the scene was identified as Applicant's knife. His conversion van was recorded entering the property where the victim's body was found at 8:00 p.m. and leaving that area at 9:00 p.m. The text messages between the victim and Applicant indicated that they were going to do drugs together in this vehicle. The victim's DNA was found in the van. The victim's blood was on the jeans Applicant was wearing on the night of the murder. GPS from the victim's phone and Applicant's phone indicated they were in the same area from 8:00 p.m. to 9:00 p.m. which was in the area the victim was found.

{¶24} We explained the concepts of sufficiency of the evidence and manifest weight of the evidence in Applicant's direct appeal. *Hackett*, 7th Dist. Mahoning No. 17 MA 106, 2019-Ohio-1091 at ¶ 64, 74-75. In determining whether the evidence is legally sufficient to support a conviction, "'[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, 919 N.E.2d 190, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. A verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001). Conversely, in determining whether a verdict is against the manifest weight of the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence

produced at trial. *Id.* at 390. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other'." (Emphasize sic.) *Id.* at 387.

{¶25} Viewed in the light most favorable to the prosecution, there was sufficient evidence Appellant committed the murder. Furthermore, given the evidence it cannot be concluded the jury clearly lost its way and created a manifest miscarriage of justice.

{¶26} Applicant's third argument lacks merit.

IV. Fourth Argument – Merger of Rape and Kidnapping

Proposed Assignment of Error

"The trial court erred in not merging Hackett's convictions for rape and kidnapping at sentencing, violating his protection against Double Jeopardy, as provided by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section § 10 of the Ohio Constitution."

{¶27} Applicant contends that the trial court erred when it failed to merge the kidnapping and rape convictions. He contends they were committed at the same time.

{¶28} At sentencing, Applicant did state that rape and kidnapping are allied offenses. Sentencing Tr. 7.

{¶29} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, the Supreme Court of Ohio held that if a defendant's conduct supports multiple offenses, the defendant can be convicted of all of the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import; (2) the conduct shows the offenses were committed separately; or (3) the conduct shows the offenses were committed with separate animus. *Id.* at paragraph three of the syllabus and ¶ 31.

{¶30} Arguments concerning the merger of rape and kidnapping convictions have been asserted to many appellate courts. As the Eighth Appellate District has noted even though *Ruff* is the most current pronouncement on merger from the Ohio Supreme Court, when it comes to determining whether rape and kidnapping convictions merge, Ohio appellate courts still apply the older test found in *State v. Logan*, 60 Ohio St.2d 126, 135, 397 N.E.2d 1345 (1979), which dealt specifically with rape and kidnapping convictions. *State v. Williams*, 8th Dist. Cuyahoga No. 107748, 2019-Ohio-2335, ¶ 78. *See also Cargle*, 2d Dist. Montgomery No. 28044, 2019-Ohio-1544 at ¶ 42-46. "The primary issue * * * is whether the restraint or movement of the victim is merely incidental to a separate

underlying crime or, instead, whether it has a significance independent of the other offense." *Williams* quoting *Logan*. Put another way, courts must ask "whether the victim, by such limited asportation or restraint, was subjected to a substantial increase in the risk of harm separate from that involved in the underlying crime." *Williams* quoting *Logan*.

{¶31} The facts of this case indicate the kidnapping was not incidental to the rape; they were committed with a separate animus. The evidence shows that the victim and Applicant were together for an hour at the location of the murder, her blood was found in the vehicle, she was stabbed 81 times, and her body was left unclothed on the access road. The state's theory was that Applicant was her drug dealer and he forced her to have sex with him to pay for her drugs. It could be determined Applicant tried to restrain her after the rape occurred with the purpose to kill her; there was one purpose to rape her and another purpose to kidnap and kill her. Accordingly, appellate counsel was not ineffective for failing to raise this claim.

V. Fifth Argument – Postrelease Control

Proposed Assignment of Error

"The trial court erred by imposing a 3-year term of post-release control as part of Hackett's sentence in violation of his Due Process protections under the Fourteenth Amendments to the U.S. Constitution and Article I, Section § 10 of the Ohio Constitution."

{¶32} Applicant argues appellate counsel was ineffective for failing to argue that the trial court incorrectly imposed a three year term of post release control for his rape conviction. He contends he was required to be sentenced to a five year term.

{¶33} Applicant was sentenced to an unclassified felony, to which post release control does not apply, and a classified felony, to which post release control does apply. Although one conviction was not subject to a term of post release control, the trial court still had an obligation to sentence the offender to the appropriate term of post release control for the classified felony:

> "[A]n individual sentenced for aggravated murder ... is not subject to post release control, because that crime is an unclassified felony to which the post release-control statute does not apply. R.C. 2967.28." *State v. Clark,* 119 Ohio St.3d 239, 2008–Ohio–3748, 893 N.E.2d 462 at paragraph 36. If a person, as here, is convicted of both an unclassified felony and a classified felony, the court still has obligations regarding post-release

> control as it relates to the classified felony. See *State v. Roseberry,* 7th Belmont Dist. No. 11 BE 21, 2012-Ohio-4115, ¶ 15. *See also State v. Wilcox,* 10th Dist. No. 13AP–402, 2013-Ohio-4347, ¶ 10 ("When a defendant has been convicted of both an offense that carries mandatory post-release control and an unclassified felony to which post-release control is inapplicable, the trial court's duty to notify of post-release control is not negated.")

State v. Montgomery, 5th Dist. Guernsey No. 18 CA 38, 2019-Ohio-2183, ¶ 12. *See also State v. Fleischer*, 7th Dist. Jefferson No. 16 JE 0011, 2017-Ohio-7762, ¶ 30.

{¶34} Applicant is correct that his conviction for a felony sex crime subjected him to a five year term of post release control. R.C. 2967.28(B)(1). At sentencing, the trial court correctly imposed a mandatory five year term. Sentencing Tr. 10. However, in the judgment entry, the trial court stated it was a three year term. 6/9/17 J.E. The trial court did amend the judgment entry nunc pro tunc, but it was not the post release control matter that was amended. The deficiency here may be corrected by a nunc pro tunc order since the trial court correctly stated the post release control term at the sentencing hearing. *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 14, 24 (When notification of postrelease control was accurately given in the sentencing hearing, the error in the sentencing entry is merely clerical in nature and the mistake is correctable by a nunc pro tunc entry; no new sentencing hearing is required.); *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, 943 N.E.2d 1010, ¶ 14.

{¶35} Applicant was not prejudiced by appellate counsel's choice to not raise this issue on appeal. The error benefits him. He was sentenced to three years when he was supposed to be sentenced to five years. Since there is no prejudice, there is no basis to reopen. However, Applicant apparently wants the error corrected. Accordingly, this court orders the trial court to issue a nunc pro tunc entry correcting the error.

VI. Sixth Argument – Private Investigator

Proposed Assignment of Error

"Hackett's rights to Due Process and a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section § 10 of the Ohio Constitution, were violated when the trial court appointed a private investigator for Hackett rather than

allowing him to retain his own with funds previously allocated by the court pursuant to R.C. 2929.024."

{¶36} Applicant's complaint is he did not get to pick his own investigator, but instead the court appointed one for him.

{¶37} R.C. 2929.024 states:

> If the court determines that the defendant is indigent and that investigation services * * * are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant's counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services * * *.

R.C. 2929.024.

{¶38} Prior to trial, Applicant acknowledged that the trial court appointed him an investigator and did not complain that it had appointed the investigator. Trial Tr. 23. Rather, he complained that the trial court never sent the investigator to speak to him. Trial Tr. 23. In response, the trial court explained that it had appointed an investigator to help Applicant and it was under no further obligation than that:

> THE COURT: You mentioned a private investigator. It's one thing to file the motion to have one appointed. It's another thing to know how to hire one. I sustained the motion for a private investigator. It's not –
>
> [STANDBY COUNSEL]: You appointed, I think, Neal.
>
> THE COURT: Okay. I went one step further and appointed Neal Zoldan as your investigator. I don't have any burden, and I know the State doesn't, to do anything other than appoint someone. Again, if you had an attorney, Attorney DeFabio would have been able to contact Mr. Zoldan to tell him what you needed done. That's not my job.

Trial Tr. 27-28.

{¶39} Applicant then admitted he was in jail and was not able to call his investigator or contact him. Trial Tr. 28.

{¶40} Applicant's statements indicate he had no issue with the trial court appointing someone; in fact it appears he wanted the trial court to appoint someone. His issue instead was figuring out how to communicate with the investigator since he was representing himself and he was in jail pending trial. Furthermore, there is no indication in the case law that appointing someone would amount to an abuse of discretion.

{¶41} Consequently, for those reasons appellate counsel was not deficient in failing to raise this issue in the direct appeal. This issue does not provide a basis for reopening the appeal.

Conclusion

{¶42} There is no basis for reopening the appeal. Although there is merit with the claim that the trial court's judgment entry imposed the incorrect term of post release control, the error benefits Applicant and thus, Applicant was not prejudiced. That said, the error is correctable by the trial court issuing a nunc pro tunc entry imposing the correct post release control term. This court orders the trial court to correct the error.

{¶43} Application to reopen the appeal is denied.

JUDGE CAROL ANN ROBB

JUDGE CHERYL L. WAITE

JUDGE DAVID A. D'APOLITO

NOTICE TO COUNSEL

This document constitutes a final judgment entry.