[Cite as *State v. Peyatt*, 2020-Ohio-1103.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

STATE OF OHIO,

Plaintiff- Appellee,

v.

WILLIAM D. PEYATT,

Defendant- Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MO 0006

Application to Reopen

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Denied.

William D. Peyatt, pro se, Inmate No. A743049, Belmont Correctional Institution, 68518 Bannock Road, St. Clairsville, Ohio 43950, for Defendant- Appellant and

Atty. James L. Peters, Prosecuting Attorney, 101 North Main Street, Woodsfield, Ohio 43793 address, for Plaintiff- Appellee.

Dated: February 21, 2020

PER CURIAM.

{¶1} Appellant, William D. Peyatt, timely seeks to reopen his appeal in *State v. Peyatt,* 7th Dist. Monroe No. 18 MO 0006, 2019-Ohio-3585, claiming appellate counsel was ineffective. The application is denied; Appellant does not present a colorable claim of ineffective assistance of appellate counsel.

Facts and Procedural History

{¶2} Appellant was indicted for eight sex crimes. *Id*. at ¶ 2. The jury found him guilty of six of those crimes - four counts of gross sexual imposition, one count of attempted gross sexual imposition, and one count of disseminating matter harmful to juveniles. *Id*. at ¶ 7. He was sentenced to an aggregate sentence of 270 months. *Id*. at ¶ 8.

{¶3} On appeal, Appellant asserted the evidence was insufficient to support the conviction for attempted gross sexual imposition, the imposition of consecutive sentences was disproportion to the conduct, and he was deprived of a fair trial when the jurors saw him in shackles in the hallway prior to voir dire and the trial court failed to give a specific curative instruction regarding his appearance in shackles. We found merit with his first argument; there was insufficient evidence of attempted gross sexual imposition. *Id*. at ¶ 10-22. However, we found no merit with the other two arguments. *Id*. at ¶ 23-43. We affirmed the convictions for gross sexual imposition and disseminating material harmful to juveniles. *Id*. at ¶ 44. We reversed the conviction for attempted gross sexual imposition and vacated the sentence for that conviction. *Id*. at ¶ 44.

{¶4} Appellant filed this timely application for reopening based on appellate counsel's alleged ineffectiveness. Appellant raises five assignments of error that were not previously considered on appeal. In the first two assignments of error, he contends there was insufficient evidence to support three of his convictions for gross sexual imposition. In his third assignment of error, he asserts cumulative error in that counsel failed to investigate and present his alibi defense and failed to select an unbiased jury. In the fourth and fifth assignments of error, Appellant contends appellate counsel did not

argue that numerous comments made by the prosecutor during opening statement and closing argument were inappropriate and prejudicial.

{¶5} The state filed a motion in opposition to Appellant's application for reopening.

Standard of Review

{¶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. Applications for reopening shall be granted if there "is a genuine issue as to whether the Appellant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). The Ohio Supreme Court has further explained that 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.

First and Second Assignments of Error

"There is insufficient evidence to support Mr. Peyatt's conviction and sixty-month sentence for gross sexual imposition in violation of O.R.C. 2907.05(A)(4) on count two."

"There is insufficient evidence to support Mr. Peyatt's conviction and consecutive sixty-month sentences for gross sexual imposition in violation of O.R.C. 2907.05(A)(4) as to counts five and six."

{¶7} In our original decision in *Peyatt* we set forth the standard of review for an insufficiency of evidence argument and the elements of gross sexual imposition as follows:

> Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally

> sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). 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). In a sufficiency of the evidence inquiry, appellate courts do not assess whether the prosecution's evidence is to be believed but whether, if believed, the evidence supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶¶ 79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence).
>
> Gross sexual imposition is defined as no person shall have sexual contact with another who is not their spouse when the other person is less than 13 years of age. R.C. 2907.05(A)(4). "Sexual contact" means touching an erogenous zone of another for the purpose of sexually arousing or gratifying either person. R.C. 2907.01(B).

Peyatt, 2019-Ohio-3585 at ¶ 14-15.

{¶8} The first assignment of error concerns the evidence to prove count 2 of the indictment. Counts 1 and 2 of the indictment were for gross sexual imposition and A.B. was identified as the victim. These were the only two counts of the indictment alleging gross sexual imposition where A.B. was identified as the victim.

{¶9} Given the record, Appellant has not set forth a colorable claim of ineffective assistance of counsel for failing to raise a sufficiency argument regarding gross sexual imposition where A.B. was identified as the victim. As set forth in the fact section of the

Peyatt decision, A.B. testified that Appellant touched her breasts and vaginal area over top of her clothes when she was 12 years old. *Id*. at ¶ 4; Tr. 344-346. She indicated this happened on more than one occasion and specifically described two instances. *Id*.; Tr. 344, 345-348. This evidence was sufficient to support two convictions for gross sexual imposition where A.B. was the victim.

{¶10} The second assignment of error concerns the two counts of gross sexual imposition, counts 5 and 6, where K.B. was identified as the victim. Appellant contends there was insufficient evidence that she was less than 13 years of age when the alleged acts occurred.

{¶11} K.B.'s testimony varies about the age when the incidents occurred. Testimony and statements indicate the incidents could have occurred anywhere between the ages of 10 and 15. Tr. 374; 393-394, 408-409. Testimony also suggested the incidents occurred when she was in sixth or seventh grade, which could indicate she was under 13 years of age when they occurred. Tr. 374. She admitted she was not certain on her age at the time of the incidents. Tr. 395, 411. Similar to the arguments under the first assignment of error, the testimony was sufficient for the evidence to be submitted to the jury for a determination of whether K.B. was under 13 years of age when the incidents occurred. Appellant has not set forth a colorable claim of ineffective assistance of counsel for failing to raise a sufficiency argument regarding gross sexual imposition where K.B. was identified as the victim.

{¶12} Neither the first nor the second assignment of error warrant reopening the direct appeal.

Third Assignment of Error

"Mr. Peyatt was deprived of his rights to a fair trial as a result of the cumulative effect of trial counsels' ineffective assistance."

{¶13} Appellant argues appellate counsel should have raised trial counsel's ineffectiveness in the direct appeal and that the numerous incidents of harmless error caused by counsel's ineffectiveness amounted to cumulative error. The two arguments asserted as a basis for cumulative error under this assignment of error are counsel's failure to investigate and present Appellant's alibi defense and that the jury was biased against him and counsel failed to remove biased jurors.

{¶14} Under the cumulative-error doctrine, "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), citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus; *State v. Ruble*, 2017-Ohio-7259, 96 N.E.3d 792, ¶ 75 (4th Dist.). "Before we consider whether 'cumulative errors' are present, we must first find that the trial court committed multiple errors." *State v. Smith*, 2016-Ohio-5062, 70 N.E.3d 150, ¶ 106 (4th Dist.), citing *State v. Harrington*, 4th Dist. Scioto No. 05CA3038, 2006-Ohio-4388, ¶ 57.

{¶15} As the state points out it is unclear what Appellant is arguing in the first argument. Appellant appears to be indicating he had an alibi and counsel did not investigate it.

{¶16} This argument, however, appears to conflict with the evidence he submitted at trial. Appellant's mother testified on his behalf. She testified that from 2007-2014 Appellant lived in West Virginia, but would come back to visit and the victims would be around him during those visits. Tr. 509. This was the time period when the incidents with K.B. were alleged to have occurred. She also testified that in 2015, Appellant had moved back to Monroe County, and the victim and Appellant were around each other at her house a lot. Tr. 503-504. The incidents with A.B. were alleged to have occurred in 2016-2017. Appellant's sister also testified on his behalf. She testified that Appellant lived in West Virginia and then moved to Monroe County in 2015 or 2016. She indicated in 2015 she visited her mother in Monroe County and would see the victims and Appellant together. Tr. 518. Both mother and sister indicated the victims acted normally with Appellant and were not scared of him. Tr. 505, 518.

{¶17} The defense Appellant presented was that the victims were lying about the incidents. The testimony of his own witnesses indicated he was around the victims when the alleged incidents allegedly occurred.

{¶18} Furthermore, this defense may have been trial strategy. "Debatable trial tactics generally do not constitute ineffective assistance of counsel." *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 222. There is no indication in

the case at hand that this trial strategy constituted deficient performance. Consequently, this does not constitute error, harmless or otherwise.

{¶19} The second argument concerns jurors' bias against Appellant. He contends the jurors were biased against him because the case involved sex crimes against children. A review of the voir dire indicates that the jurors indicated that while it would be hard to sit on a case like this they could wait to hear all the evidence before making a determination. Tr. 75, 83, 87-88, 89-90, 104, 159-160, 181. Specific questions were asked about the alleged bias that Appellant argues and the jurors indicated they could be fair and impartial; jurors who knew potential witnesses indicated that they could be fair and impartial even though they knew a witness. Tr. 85-86, 153, 188. Where the jurors indicated that they could be fair and impartial, counsel accepted their representation, and the record does not support a conclusion that counsel's failure to exercise a peremptory challenge prejudiced the defendant. Trial counsel was not ineffective. *State v. Wilson*, 8th Dist. Cuyahoga No. 107806, 2019-Ohio-4056, ¶ 28, citing *State v. Goodwin*, 84 Ohio St.3d 331, 341, 703 N.E.2d 1251 (1996).

{¶20} In conclusion, the claimed errors are not errors, harmless or otherwise. Consequently, Appellant has not presented a colorable claim of ineffective assistance regarding cumulative error. This assignment of error is meritless.

Fourth and Fifth Assignments of Error

"Prosecutor used his opening statements as an opportunity to poison the jury establishing bias in the jury depriving Mr. Peyatt a fair trial."

"Fifth Amendment violation where prosecutors comments in his closing argument were directed towards Mr. Peyatt's failure to rebut testimony evidence and comments unsupported in the record."

{¶21} In these assignments of error, Appellant contends improper statements were made during opening statements and closing argument that prejudiced the jury against him. He argues appellate counsel should have raised the argument that these improper statements prejudiced him in the direct appeal.

{¶22} Allegations of prosecutorial misconduct are viewed in the context of the entire trial. *State v. Stevenson,* 2d Dist. Greene No. 2007-CA-51, 2008-Ohio-2900, ¶ 42, citing *Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464 (1986). The prosecution is

entitled to significant latitude in its closing remarks, and is permitted to freely comment on what the evidence has shown and what reasonable inferences may be drawn. *State v. Maurer*, 15 Ohio St.3d 239, 267, 473 N.E.2d 768 (1984). Considerable latitude likewise extends to a prosecutor's opening statement. *State v. Whitfield*, 2d Dist. Montgomery No. 22431, 2009-Ohio-293, ¶ 12. "During opening statement, a prosecutor may, in good faith, make statements as to what he expects to prove by competent evidence." *State v. Neal*, 10th Dist. Franklin No. 95APA05-542, 1996 WL 28765 (Jan. 23, 1996). Further, the focus of the analysis for both opening statement and closing argument is on the "fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940 (1982).

{¶23} As to opening statement, there are three comments the prosecutor made that Appellant is complaining are improper.

{¶24} The first comment was a reference to a statement K.B. made to her mother about Appellant raping her. Appellant was acquitted of the rape. Therefore, it is difficult to conclude that any prejudice resulted from this statement.

{¶25} The second comment was about the Sherriff's Department being unable to obtain evidence from an inoperable laptop and tablet that were legally seized during the execution of a search warrant. It is unclear how this statement is prejudicial when the state was admitting no evidence could be seized from the items.

{¶26} The last statement concerned the statement that the state suspected Appellant raped K.B. prior to her being 13 years of age. When read in the entire context, the state was indicating that while one rape might have occurred prior to her turning 13 years of age, the rape that it was attempting to prove occurred after she was 13 years of age. As discussed above, K.B.'s testimony regarding her age as to when events occurred varied; she was not always sure of her age. While the state should not have stated that it suspected she was raped prior to turning 13 years of age, the statement was made to show that it had to prove she was under 13 years of age for the gross sexual imposition charges, but not for the rape charge. Furthermore, as with the first statement, Appellant was not convicted of rape so it is unclear how he was prejudiced.

{¶27} As to closing argument, Appellant alleged many comments that he contends prejudiced the jury against them. For a prosecutor's closing argument to be prejudicial,

the remarks must be "so inflammatory as to render the jury's decision a product solely of passion and prejudice." *State v. Williams*, 23 Ohio St.3d 16, 20, 490 N.E.2d 906 (1986). To determine whether the remarks were prejudicial, the closing argument must be viewed in its entirety. *State v. Slagle*, 65 Ohio St.3d 597, 607, 605 N.E.2d 916 (1992).

{¶28} In reviewing the closing argument in its entirety and in the context of the arguments made by Appellant's counsel, the statements complained of were a summarization of the evidence and conclusions drawn from what that evidence showed. During closing argument, the state can summarize the evidence and draw conclusions as to what the evidence shows. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶ 116. Furthermore, none of the statements can be characterized, together or on their own, as "so inflammatory as to render the jury's decision a product solely of passion and prejudice." Thus, it cannot be concluded that the statements made during closing argument prejudiced Appellant.

{¶29} These assignments of error are meritless. The prosecutor did not make improper statements during opening or closing that prejudiced Appellant. In these assignments of error Appellant has failed to demonstrate a colorable claim of ineffective assistance of appellate counsel.

Conclusion

{¶30} None of the assignments of error provide a basis to reopen the appeal. Application for reopening is denied.

JUDGE CAROL ANN ROBB

JUDGE GENE DONOFRIO

JUDGE DAVID A. D'APOLITO

NOTICE TO COUNSEL

This document constitutes a final judgment entry.