[Cite as *State v. Wainwright*, 2020-Ohio-4734.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

GERALD WAINWRIGHT,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0023

Application to Reopen

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

JUDGMENT:
Application Denied.

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

Gerald Wainwright, *Pro Se,* #760-881, Mansfield Correctional Institution, P.O. Box 788, Mansfield, Ohio 44901, Defendant-Appellant.

Dated: September 24, 2020

PER CURIAM.

{¶1} On June 3, 2020, Appellant, Gerald Wainwright, acting pro se, filed a timely application to reopen his direct appeal pursuant to App.R. 26(B)(1). The state filed its response brief on June 12, 2020. Appellant's opposition to the state's response brief was filed on June 26, 2020. Appellant was convicted of two counts of felonious assault, with corresponding firearms specifications, and having a weapon under a disability, after he fired a 9 mm handgun at two Youngstown Police Department officers in a patrol car in the early morning hours of January 27, 2018. Appellant was sentenced to ten years for each felonious assault conviction, plus seven years for each firearms specification, and twelve months for having a weapon while under disability conviction, with all sentences imposed to run consecutively, for an aggregate term of imprisonment of thirty-five years.

{¶2} In his direct appeal, Appellant asserted two assignments of error. First, he argued that the trial court abused its discretion when it provided a flight instruction to the jury. Next, he argued that the verdicts were against the manifest weight of the evidence. On February 21, 2020, we affirmed Appellant's felonious assault convictions.

{¶3} In his application to reopen, Appellant contends that his appellate counsel provided ineffective assistance because he did not challenge trial counsel's failure to impeach the officers' trial testimony with prior inconsistent statements. He further argues that his appellate counsel should have challenged the trial court's failure to merge his felonious assault convictions, because they were the result of the same act and the same animus. For the following reasons, Appellant's application is denied.

APP.R. 26(B)(1)

{¶4} Pursuant to App.R. 26(B)(1), a criminal defendant "may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." An application for reopening must contain "[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). See also *State v. Clark*, 7th Dist. Mahoning No. 08 MA 15, 2015-Ohio-2584, ¶ 19.

{¶5} An applicant must demonstrate that "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). If the application is granted, the appellate court must appoint counsel to represent the applicant if the applicant is indigent and unrepresented. App.R. 26(B)(6)(a).

{¶6} In order to show ineffective assistance of appellate counsel, the applicant must meet the two-prong test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Pursuant to *Strickland*, the applicant must demonstrate both deficient performance of counsel and resulting prejudice. *Id.* at 687, App.R. 26(B)(9). To show ineffective assistance of appellate counsel, Appellant must prove that his counsel was deficient for failing to raise the issues that Appellant now presents and that there was a reasonable probability of success had those claims been presented on appeal. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

{¶7} There is a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *Id.* at 142-143, citing *Strickland*, 466 U.S. at 689. Appellate counsel has considerable discretion to choose the errors to be assigned on appeal and focus on the arguments perceived as the strongest. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 7. Appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. *Id.*

{¶8} Further, assertions in an application to reopen that rely on information outside of the record cannot demonstrate a colorable claim of ineffective assistance of appellate counsel. See *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶ 11. Ineffective assistance of counsel cannot be established where appellate counsel declines to raise claims with no support in the record. *State v. Hill*, 90 Ohio St.3d 571, 573, 740 N.E.2d 282 (2001).

FACTS

{¶9} At approximately 2:30 a.m. on January 27, 2018, Youngstown Police Department Officers Timothy Edwards and Brandon Caraway were patrolling a high crime

area on the City's south side in the vicinity of the former Princeton Junior High School (now Alpha School of Excellence) ("school"). They encountered Appellant, who was walking northbound in the southbound lane of Hudson Avenue. Appellant was wearing a hoodie and his face was covered with a mask. He was carrying a book bag.

{¶10} Although it was approximately 35 degrees that evening, the sidewalks were clear of snow. A Youngstown municipal ordinance prohibits pedestrians from walking in the roadway when the use of a sidewalk is practicable. Violation of the code section constitutes a minor misdemeanor and is not an arrestable offense. Officer Caraway testified that the officers reversed the course of the patrol car in order to stop and speak with Appellant, so as to identify him, check for warrants, and explain the danger associated with walking in the street at 2:30 a.m.

{¶11} When the officers activated the lights on the patrol car and began following Appellant, his pace quickened. Officer Caraway twice activated the air horn, which prompted Appellant to look back briefly, but he did not stop walking. Then, Appellant ran across the street in a northeast direction and entered the gate of the fence of the school parking lot.

{¶12} Appellant testified at trial that he was attempting to avoid a confrontation with the officers because he was carrying a Kahr Luger CW9 9 mm semiautomatic pistol and he was under a disability as a result of a previous felony conviction. Appellant had just smoked marijuana at a friend's house and he was walking home to the west side of Youngstown. He explained that his friend, who he refused to identify, gave him the weapon for protection on the approximately one-and-one-half-hour journey through the City.

{¶13} Officer Caraway testified at trial that the officers followed Appellant in the patrol car, but left a "reactionary gap" of 30 to 40 feet in order to allow them to see if he discarded drugs or weapons, and to prevent them from injuring him should he trip and fall. When Appellant realized that he was fenced in the school parking lot, he discarded the book bag and circled towards his entry point. According to the officers, Appellant then turned and fired the 9 mm pistol at the patrol car. The officers testified that Appellant did not break his forward stride, but that he turned his body just enough to fire at the patrol car.

{¶14} Officer Caraway did not see Appellant draw the weapon, only turn and fire. Specifically, Officer Caraway testified that Appellant was “not stationary, he was still moving.” (Trial Tr., p. 226), but that the weapon was “aimed directly at [the patrol car.]” (*Id.*, p. 227.) Officer Edwards stated that he observed Appellant “fidgeting around with something,” and then Appellant “pulled a pistol from somewhere on his person * * * he turned, pointed the pistol at [the officers], and then he fired a shot.” (*Id.*, p. 276-277.)

{¶15} Three spent 9 mm casings were found at the scene, and were identified at trial by a firearms expert from BCI as having been ejected from Appellant's weapon. Officer Caraway testified that he heard two shots. Officer Edwards testified that he heard only one shot. Both officers conceded that they did not see a muzzle flash or flashes. Edwards explained that the lights on the patrol car are very bright and may have “washed [ ] out” the muzzle flash. (*Id.*, p. 314.)

{¶16} Appellant admitted that he “got nervous, got scared” and discharged the weapon. (*Id.* at 536.) He could not recall how many bullets were fired. However, Appellant testified that he discharged the weapon “straight in the air, straight ahead of [him].” Appellant further testified that “[he] was trying to stop the officers from chasing [him.] And to show that [he] was not trying to cause harm, [he] threw [the weapon] down, around that same time.” (*Id.* at 537.)

{¶17} Both officers testified that they feared for their lives and were unaware that Appellant had discarded the weapon until he was apprehended. Officer Caraway crouched behind the dashboard and opened his door in order to exit the patrol car and engage Appellant on foot. He testified that he would not have ducked beneath the dashboard if Appellant had fired the pistol in the air. Officer Caraway exited the vehicle and discharged his weapon approximately six times.

{¶18} Meanwhile, Officer Edwards, who was in the driver's seat, immediately returned fire through the windshield. Officer Caraway, who was crouched behind the dashboard at the time, mistook Edwards' return fire for fire from Appellant. After Officer Edwards fired six to eight shots, the windshield became “glazed over,” so he exited the patrol car to give chase on foot. The officers apprehended Appellant in the backyard of the residence at 397 West Princeton Avenue.

{¶19} The patrol car did not sustain any damage as a result of any of the bullets fired by Appellant. The only damage sustained by the patrol car was the result of Officer Edwards firing through the windshield. Although three spent 9 mm casings with breech marks and firing pin compressions matching the 9 mm pistol were recovered from the scene, no projectiles from the weapon were found.

{¶20} On January 30, 2018, Captain Jason Simon and Detective Sergeant Ronald Rodway of the Youngstown Police Department interviewed Officer Caraway and Officer Edwards. The officers were interviewed independently of one another and the interviews were recorded. The recorded interviews were not admitted into evidence.

{¶21} On February 12, 2018, roughly two weeks after the incident, Appellant was interviewed by Captain Simon and Detective Rodway. Captain Simon was a member of the shooting team assigned to the officer-involved shooting of Appellant. Detective Rodway was the detective assigned to the felonious assault case. Appellant signed a waiver of his right to counsel.

{¶22} During the interview, Appellant admitted that he smoked marijuana at a friend's house on January 27, 2018, and that his friend, who he declined to identify, gave him the 9 mm pistol. Appellant further admitted that he was attempting to avoid a confrontation with the officers that evening because he was a felon under a weapons disability. He ultimately admitted to firing the weapon a single time into the air.

{¶23} At the sentencing hearing, the state raised the issue of allied offenses of similar import and argued that merger was unwarranted because the felonious assault convictions involved to two separate victims. (2/11/19 Sentencing Tr., p. 4.) Appellant's trial counsel did not dispute the state's merger argument.

ASSIGNMENT OF ERROR NOT CONSIDERED ON APPEAL DUE TO APPELLATE COUNSEL'S * * * INEFFECTIVENESS FOR FAILURE TO RAISED [SIC] ISSUES OF TRIAL COUNSEL'S FAILURE TO "IMPEACH PRIOR INCONSISTENT STATEMENTS OF OFFICER CARAWAY AND OFFICER EDWARDS TESTIMONYS DURING THE TRIAL.

{¶24} In his first assignment of error, Appellant contends that his appellate counsel was ineffective because he did not challenge trial counsel's failure to impeach

the testimony of Officers Caraway and Edwards with prior inconsistent statements from their interviews. He argues that he was entitled to impeach their credibility with extrinsic evidence pursuant to Evid. R. 613(B).

{¶25} In a claim for ineffective assistance of counsel, Appellant bears the burden of demonstrating that trial counsel's performance fell below an objective standard of professional competence. If successful in demonstrating that counsel committed professional error, the appellant must then demonstrate he was prejudiced by that deficiency. *Strickland, supra,* at 687. “Prejudice” in this context, means a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694.

{¶26} Reversal as a result of prejudice from defective representation is justified only where the results are unreliable or the proceeding was clearly fundamentally unfair due to counsel's performance. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). A reviewing court is highly deferential to trial counsel's strategy and must indulge in a strong presumption that counsel's performance fell within a wide range of reasonable professional assistance. *Bradley*, supra, at 141-142.

{¶27} Evidence Rule 613(B) allows the admission of extrinsic evidence of a prior inconsistent statement if “the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;” and if the subject matter of the statement “is of consequence to the determination of the action other than the credibility of a witness,” or otherwise meets the requirements of Evid.R. 613(B)(2). *State v. Reed*, 155 Ohio App.3d 435, 2003-Ohio-6536, 801 N.E.2d 862, at ¶ 29. A trial court's ruling on an Evid.R. 613(B) issue, like other evidentiary rulings, is reviewed for an abuse of discretion. *State v. Reiner*, 89 Ohio St.3d 342, 357–358, 2000-Ohio-190, 731 N.E.2d 662, reversed on other grounds; *State v. McKinnon*, 7th Dist. Columbiana No. 02 CO 36, 2004-Ohio-3359, at ¶ 51. An abuse of discretion indicates that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Brady,* 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, at ¶ 23.

{¶28} In his direct appeal, Appellant's manifest weight of the evidence argument was predicated upon inconsistencies in the officers' trial testimony regarding the position of Appellant's right hand when he fired the 9 mm pistol, and their description of the events during the recorded interviews with Detective Rodway and Captain Simon on January 30, 2018.

{¶29} On cross-examination, Officer Edwards could not recall whether Appellant used his left or right hand to fire the 9 mm pistol. When he reenacted Appellant's movements during his recorded trial testimony, Officer Edwards turned back to his right with his right hand to shoot. After viewing a portion of his January 30th interview, Officer Edwards conceded that he reached across his right side with his left hand when he reenacted Appellant's movements during the interview.

{¶30} Officer Caraway conceded at trial that he had his hand out to his side when he reenacted Appellant's movements during the interview. Officer Caraway explained the position of his hand on cross examination stating, "It's showing that he was pointing it at us. I might not have reached all the way around." (Trial Tr., p. 249.) Detective Rodway testified that to the best of his recollection he recalled both officers saying that "they saw the gun pulled * * * turned in their directions." (*Id.*, p. 519.)

{¶31} Based upon the foregoing testimony, Appellant's trial counsel cross-examined the officers regarding the inconsistencies in the trial testimony and their statements during their police interviews. Consequently, Appellant has not demonstrated any deficient performance on the part of his appellate counsel based on his failure to challenge trial counsel's cross-examination of the officers.

{¶32} To the extent that Appellant contends there were additional inconsistencies in the officers' trial testimony and their interviews, the interviews are not in the record. Where a proposed error concerns a matter outside the trial record, it is not a basis for reopening the direct appeal on the theory that appellate counsel rendered ineffective assistance in failing to raise that issue. *State v. Croom*, 7th Dist. Mahoning No. 12MA54, 2014-Ohio-1945, ¶ 10-12. Accordingly, we find that Appellant's first assignment of error has no reasonable probability of success.

ASSIGNMENT OF ERROR NOT CONSIDERED ON APPEAL DUE TO APPELLATE COUNSEL'S * * * INEFFECTIVENESS FOR FAILURE TO

RAISED [SIC] TRIAL COURT ERRED WHEN IT FAILED TO MERGE ALLIED OFFENSE OF SIMILAR IMPORT UNDER R.C. 2941.25.

{¶33} Pursuant to the allied offenses of similar import statute, "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). However, if the conduct constitutes two or more offenses that are of dissimilar import, the conduct results in two or more offenses committed separately, or if there is separate animus as to each offense, the indictment may contain counts for all such offenses and the defendant may be convicted of all of them. R.C. 2941.25(B).

{¶34} R.C. 2941.25 codifies the double-jeopardy protection which prohibits the imposition of multiple punishments for convictions of allied offenses of similar import. *In re A.G.,* 148 Ohio St.3d 118, 2016-Ohio-3306, 69 N.E.3d 646, ¶ 11. The trial court must apply a three-part test for determining whether the defendant has been convicted of allied offenses of similar import. *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 18, quoting *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 25.

{¶35} The trial court "must evaluate three separate factors--the conduct, the animus, and the import--" to determine if the offenses constitute a single offense or separate offenses. Separate offenses are: (1) "dissimilar in import or significance – in other words, each offense caused separate, identifiable harm" to a single victim or there was harm to multiple victims, (2) "committed separately," or (3) "committed with separate animus or motivation." *Id.* Multiple offenses do not merge if there is more than one victim harmed or there is more than one type of harm. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 4, citing *Ruff*, *supra.*

{¶36} We review the trial court's determination de novo. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28. Where, as here, Appellant's trial counsel did not argue that the felonious assault convictions were allied offenses, the Ohio Supreme Court has held that imposition of multiple sentences for allied offenses of similar import is plain error. *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96-102.

{¶37} Appellant argues that his felonious assault convictions are predicated upon the same conduct, which was committed with a single state of mind. However, Appellant's felonious assault convictions involved two separate victims.

{¶38} "When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts." *Ruff, supra,* at ¶ 26. The Ohio Supreme Court in *Ruff* explained the multiple-victim rule was predicated upon the Court's definition of the term "import:"

> The state alleges that no opinion from this court has ever clearly defined "import." However, in at least two cases we have illustrated when offenses are of dissimilar import. In each case, we held that when the defendant's conduct put more than one individual at risk, that conduct could support multiple convictions because the offenses were of dissimilar import. *State v. Jones*, 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985)(although there was only one car accident, "we view appellant's conduct as representing two offenses of dissimilar import—the 'import' under R.C. 2903.06 being each person killed"); *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 48 (even though the defendant set only one fire, his conduct caused six offenses of dissimilar import due to risk of serious harm or injury to each person).

Id. at ¶ 23.

{¶39} The *Ruff* Court stated that multiple victims *could* support multiple convictions because the offenses were not of similar import. Even assuming that a crime committed against multiple victims can result in allied offenses of similar import, the facts in this case do not support merger of the felonious assault convictions. Appellant's conduct in this case jeopardized the lives of two police officers, each of whom suffered separate harm. The officers testified that they feared for their lives, both when Appellant discharged the pistol, and when they followed him on foot, as they were unaware that he

discarded the weapon until he was apprehended. Accordingly, we find Appellant's second assignment of error has no reasonable probability of success.

{¶40} For the foregoing reasons, Appellant's application is denied.

JUDGE DAVID A. D'APOLITO

JUDGE CHERYL L. WAITE

JUDGE CAROL ANN ROBB

NOTICE TO COUNSEL

This document constitutes a final judgment entry.