[Cite as *State v. Walker*, 2019-Ohio-2211.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 106571
v.	:	
CHARLES WALKER,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: May 31, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-17-615721-C
Application for Reopening
Motion No. 525911

Appearances:

Michael C. O'Malley, Prosecuting Attorney, by Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellee*.

Charles Walker, *pro se*.

LARRY A. JONES, SR., J.:

{¶ 1} Charles Walker has filed a timely application for reopening pursuant to App.R. 26(B). Walker is attempting to reopen the appellate judgment, rendered in *State v. Walker*, 8th Dist. Cuyahoga No. 106571, 2018-Ohio-5172, that affirmed

his conviction and sentence of incarceration for the offenses of aggravated murder, murder, discharge of a firearm on or near prohibited premises, felonious assault, improperly handling firearms in a motor vehicle, and carrying concealed weapons. We decline to reopen Walker's original appeal.

I. Standard of Review Applicable to App.R. 26(B) Application for Reopening

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, Walker is required to demonstrate that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990).

{¶ 3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*.

II. Convictions against Manifest Weight

{¶ 4} Walker, through his first proposed assignment of error, argues that appellate counsel failed to assert on appeal that his convictions for the offenses of aggravated murder, murder, felonious assault, and discharge of a firearm near prohibited premises were against the manifest weight of the evidence.

{¶ 5} The principles of res judicata may be applied to bar the further litigation of issues that were raised previously or could have been raised previously in an appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Claims of ineffective assistance of appellate counsel in an application for reopening may be barred from further review by the doctrine of res judicata unless circumstances render the application of the doctrine unjust. *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992); *State v. Logan*, 8th Dist. Cuyahoga No. 88472, 2008-Ohio-1934.

{¶ 6} The issue raised by Walker through his first proposed assignment of error, manifest weight, has already been addressed upon direct appeal though his fifth assignment of error. This court held that:

> For his fifth assigned error, Walker challenges his convictions as being against the manifest weight of the evidence.
>
> When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the

> conviction." *State v. Martin*, 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717 (1st Dist.1983).
>
> * * *
>
> A conviction is "'not against the manifest weight of the evidence simply because the jury believed the prosecution testimony."' *State v. Moore*, 2d Dist. Montgomery No. 20005, 2004-Ohio 3398, ¶ 52, quoting *State v. Gilliam*, 9th Dist. Lorain No. 97CA006757, 1998 Ohio App. LEXIS 3668 (Aug. 12, 1998). The weight to be given to the evidence and the credibility of the witnesses are issues primarily for the trier of fact, and the jury is free to believe all, none or portions of the testimony. *State v. Long*, 127 Ohio App.3d 328, 335, 713 N.E.2d 1 (4th Dist.1998). Thus, the fact that the jury may or may not have found all of a particular witness's testimony to be credible is not a basis for reversal on manifest weight grounds.
>
> After carefully reviewing the trial court's record in its entirety, we conclude that the jury did not lose its way in resolving credibility determinations, nor did the convictions create a manifest miscarriage of justice. The jury was in the best position to determine the credibility of the testimony presented, and we decline to substitute our judgment for that of the trier of fact. Consequently, we cannot say that Walker's convictions were against the manifest weight of the evidence.

State v. Walker, *supra*, at ¶ 68.

{¶ 7} The fifth assignment of error is overruled.

{¶ 8} Res judicata prevents this court from once again determining whether Walker's convictions were against the manifest weight of the evidence. *State v. Tate*, 8th Dist. Cuyahoga No. 81682, 2004-Ohio-973. We further find that circumstances do not render the application of the doctrine of res judicata unjust. Walker has failed to establish any prejudice through his first proposed assignment of error.

III. Juror Coerced into Findings of Guilty

{¶ 9} Walker, through his second proposed assignment of error, argues that appellate counsel failed to assert on appeal the issue that the trial court coerced a juror into finding him guilty of the indicted offenses.

{¶ 10} During jury deliberations, the trial court received a message from Juror No. 6, asking to be excused and replaced with an alternate juror. In response to the request to be excused and replaced, the trial court questioned Juror No. 6, on the record, with regard to the request for replacement by an alternate juror:

> THE COURT: Back on the record in *State of Ohio vs. Charles Walker*. I've received a communication from Juror No. 6, who we believe is the foreperson. It states: "May I be excused for another alternate to enter?"
>
> Both counsel are here. You're going to waive your client's presence?
>
> DEFENDANT'S ATTORNEY: Judge, we are waiving.
>
> THE COURT: I'm going to speak to the juror on the record, but counsel will not be present.
>
> DEFENDANT'S ATTORNEY: Okay.
>
> THE COURT: Very good.
>
> * * *
>
> (Thereupon, Juror No. 6 was brought in the courtroom for inquiry outside the presence of counsel and on the record as follows:)
>
> * * *
>
> THE COURT: We're on the record with Juror No. 6, K.D. She has sent a note to us indicating, "May I be excused for another alternate to enter?"
>
> What's your reason, ma'am?

JUROR NO. 6: I don't want to interrupt the court process by my disagreement for a unanimous vote.

THE COURT: In other words, you're at odds with the remaining jurors?

JUROR NO. 6: Right. It's just becoming uncomfortable.

THE COURT: You don't have any concerns for your personal safety, do you?

JUROR NO. 6: No.

THE COURT: Okay. Nobody has approached you about this case?

JUROR NO. 6: No.

THE COURT: Okay. I'm going to ask you to return and continue to deliberate.

JUROR NO. 6: I'm sorry?

THE COURT: I'm going to ask you to return to the jury room and continue with your deliberation.

JUROR NO. 6: Okay.

THE COURT: Thank you.

* * *

(Thereupon, proceedings were concluded.)

Tr. 637.

{¶ 11} A review of the discussion held between the trial court judge and Juror No. 6 fails to disclose the existence of any coercion to reach a unanimous verdict. The trial court judge inquired as to whether Juror No. 6 felt threatened or approached by any party with regard to her deliberation. In addition, the trial court simply instructed Juror No. 6 to return to deliberation, which cannot be considered any form of coercion. *State v. Howard*, 42 Ohio St.3d 18, 537 N.E.2d 188 (1989);

State v. King, 8th Dist. Cuyahoga No. 99319, 2013-Ohio-4791; *State v. Glenn*, 1st Dist. Hamilton No. C-090205, 2011-Ohio-829.

{¶ 12} It must also be noted that Juror No. 6 affirmed that she agreed with the jury's verdict in open court. Tr. 644. Finally, any other claim of the coercion of Juror No. 6 dehors the record and cannot be addressed through this App.R. 26(B) application for reopening. Matters outside the record do not provide a basis for reopening. *State v. Hicks*, 8th Dist. Cuyahoga No. 83981, 2005-Ohio-1842.

{¶ 13} Walker has failed to establish that he was prejudiced through his second proposed assignment of error.

IV. Improper Imposition of Postrelease Control

{¶ 14} Walker, through his third proposed assignment of error, argues that appellate counsel failed to assert on appeal that the trial court failed to separately impose postrelease control on Count 13 (improperly handling a firearm in a motor vehicle) and Count 15 (carrying concealed weapons).

{¶ 15} With regard to the issue of imposing separate postrelease control for each individual offense, we have held that:

> This court has previously rejected the argument that a trial court is required to impose separate terms of postrelease control for each individual offense. See *State v. Davis*, 8th Dist. Cuyahoga No. 104574, 2018-Ohio-1147, ¶ 69-70; *State v. Makin*, 8th Dist. Cuyahoga No. 104010, 2017-Ohio-8569, ¶ 6-8; *State v. Byrd*, 8th Dist. Cuyahoga No. 98037, 2012-Ohio-5728, ¶ 3-33; *State v. Orr*, 8th Dist. Cuyahoga No. 96377, 2011-Ohio-6269, ¶ 46-50; *State v. Morris*, 8th Dist. Cuyahoga No. 97215, 2012-Ohio-2498, ¶ 16-18; *see also State v. Reed*, 2012-Ohio-5983, 983 N.E.2d 394, ¶ 12 (6th Dist.) ("[T]he sentencing court only has the duty in multiple offense cases to notify the defendant of and impose the longest term of post-release control applicable under R.C. 2967.28(B). * * * [T]he trial court need not announce at the sentencing

> hearing nor include in the sentencing judgment the applicable post-release control sanction for each individual offense * * *."). As this court has explained, R.C. 2967.28(F)(4)(c) "precludes the court or parole board from imposing more than one period of postrelease control in cases that involve multiple convictions." See *Davis* at ¶ 70; *see also* R.C. 2967.28(F)(4)(c), ("If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.").

State v. Parker, 8th Dist. Cuyahoga No. 106585, 2018-Ohio-3677.

{¶ 16} Herein, the record clearly demonstrates that the trial court imposed mandatory postrelease control upon Walker with regard to Counts 11 and 12 and discretionary postrelease control with regard to Counts 13 and 15. The trial court possessed the duty, because of multiple offenses, to simply impose the longest term of postrelease control under R.C. 2969.28(B). The trial court was not required to pronounce at the sentencing hearing, nor in the sentencing journal entry, the applicable postrelease control sanction for each individual offense. *State v. Reed*, *supra*. We further find that the trial court complied with *State v. Grimes*, 151 Ohio St.3d 19, 2017-Ohio-2927, 85 N.E.3d 700, upon imposing postrelease control on Walker. Walker's sentence was not void and he has failed to establish any prejudice through his third proposed assignment of error.

{¶ 17} Accordingly, the application for reopening is denied.

LARRY A. JONES, SR., JUDGE

EILEEN A. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR