[Cite as *State v. Simpson*, 2020-Ohio-1596.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 107407
v.	:	
NATHANIEL SIMPSON,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: April 17, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-17-621424-A
Application for Reopening
Motion No. 532836

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Jennifer M. Meyer, Assistant Prosecuting Attorney, *for appellee*.

Russell S. Bensing, *for appellant*.

EILEEN T. GALLAGHER, A.J.:

{¶ 1} On October 16, 2019, the applicant, Nathaniel Simpson, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Simpson*, 8th Dist. Cuyahoga No. 107407, 2019-Ohio-2912, in which this court affirmed his convictions

for felonious assault, abduction, and domestic violence. Simpson maintains that his appellate counsel should have argued that his trial counsel was ineffective for failing to assert the "Castle Doctrine" defense under R.C. 2901.05(B). On December 16, 2019, the state of Ohio filed its brief in opposition, and Simpson filed a reply brief on December 20, 2019. For the following reasons, this court denies the application.

{¶ 2} This case concerns an altercation between Simpson ("the father") and his then 19-year-old daughter at the father's home on Monday, July 3, 2017. The two parties agreed that they got into a physical altercation during which the father grabbed the daughter's hair and they fell. Beyond that, the daughter's version and the father's version differed significantly, and the case turned on the credibility of the two witnesses.

{¶ 3} In a bench trial, the daughter testified that when her father was being treated for lung cancer, she would visit him often, made sure that he took his medicines, and helped care for him. Approximately two weeks before the incident, the father had a chemo therapy session, and the daughter testified that she stayed with him and helped care for him during those two weeks by preparing meals and getting groceries using his car. During the weekend of July 1 and 2, 2017, she visited her friends in Toledo. She further testified that as she was returning from her trip on July 3, she exchanged text messages with her father, and "were slightly arguing through our text message." (Tr. 32.) So much so, that she said she would get her belongings and return to her mother's house, her regular residence.

{¶ 4} The daughter continued her testimony that when she arrived at her father's house, they engaged in a long discussion that ended in an argument and the altercation. During that conversation, the father got more agitated and angry. The daughter called her cousin, who came to drive her home. The cousin called several times, and the daughter talked to the cousin, who overheard some of the argument. However, when the daughter did not come out, the cousin left. The daughter tried to arrange another ride with a friend, but that was not materializing. The daughter further testified that she then went back into the room where she was staying to collect the last of her belongings, she said that she would walk home in the dark. At that, she testified the father went crazy. He grabbed her by the hair and threw her face-down on the bed. He then put his knee in her back and pulled her head back by the hair. The daughter testified that she was afraid of serious injury, even though she did not feel any pain at the time. She twisted around and they both landed on the floor. She must have hit her head during the altercation, because she testified that she later saw a long bruise on her face and had a knot on her head. Right after the altercation, her friend was able to pick her up.

{¶ 5} Although the daughter did not feel pain during the altercation, she testified that the next day, her neck hurt when she moved. On the advice of her sister, she went to the hospital. After examinations and a CT scan, she was diagnosed with a minor concussion, a minor neck sprain, and a contusion in her back.

{¶ 6} The cousin testified that when she arrived at the father's house, she called the daughter, who indicated that she would be out shortly. When the

daughter did not come out, the cousin called again. This time she could hear a back-and-forth conversation and the sounds of a tussle. She could hear a man yelling, but not the exact words. Before the phone went dead, she could hear the daughter say "Get off me." The cousin then left.

{¶ 7} In his testimony, the father denied that the daughter had stayed with him after the chemo therapy. His other children helped during that time. He explained that because the daughter smoked marijuana, the residue fumes could be harmful to him after chemo. He testified that in the text messages to his daughter on July 3, 2017, he forbid her to come over to his house. He further said that he had taken the keys to his house from the daughter.

{¶ 8} However, the daughter knew where the emergency key was and she unlocked the door and entered. The father first thought it was his sister. However, when he saw it was the daughter, he asked what she was doing in his house, and she replied that she came to pick up her clothes. He then told her to leave, but the daughter was talking to the cousin on her phone, "giggling, laughing." (Tr. 132.) The daughter said "he's not going to do nothing." (Tr. 133.) He then testified as follows:

> I crawled out of my bed. I rolled over, * * *. I got out of this bed and I went to the door and I went to grab [the daughter.] And [she] reached up as though she was going to punch me. And when she did, I reached up to try to grab her hair and her arm. Because I had her arm at first, and I was going to take her to the door. She swung around. * * * and she spin me and I wasn't in physical condition to do much about it. So I fell. And as I fell, * * * she rolled over and she fell on me. I grunted. And then when she was -- when she made a move that's when she hit her head on the base of the bed. I didn't make her do that. She spun

> me, and when she spun me I fell first, and she fell on top of me. * * * And after that occurred, she got up off me. And as I was getting up I grabbed the bed and she grabbed me and that's when we both fell on the bed.

(Tr. 134-135.)

{¶ 9} The father denied that he "gyrate[d] his daughter's head or any of those things." (Tr. 135.) He then took her belongings to the door and threw them on the porch. He then went to get his daughter. "She then swolled up at me again." (Tr. 135.) Then when he asked her to leave, she left. He further testified that he never hindered her from leaving.

{¶ 10} In his closing argument, the father's trial counsel highlighted the important conflicting testimony and the things the daughter had done that could upset a parent. He concluded that the evidence did not prove beyond a reasonable doubt that the father had done anything knowingly wrong. The state did not prove its case beyond a reasonable doubt. He did not argue self-defense or defense of home. His apparent strategy was that given the conflicting evidence, the state did not and could not prove the offenses beyond a reasonable doubt.

{¶ 11} The trial judge found the father guilty as charged of felonious assault, abduction, and domestic violence. She explained: "I made my decision based on evaluating the credibility of the witnesses and evaluating the evidence presented to me." (Tr. 187.) The judge sentenced him to two years of community control.

{¶ 12} The father's appellate counsel first argued that the trial court erred in denying the father's Crim.R. 29 motion for acquittal because the state failed to

present sufficient evidence to establish beyond a reasonable doubt the elements necessary to support the convictions. As part of this argument, he invoked the father's testimony that he forbid the daughter to enter. Thus, she was a trespasser on his property. Counsel also referred to the evidence that the father thought the daughter was going to hit him. Counsel further argued that because the father was in his home and the daughter did not have permission to be there, the father had the privilege to defend himself under R.C. 2901.09(B) that a person who is lawfully in his residence has no duty to retreat before using self-defense or defense of the property.

{¶ 13} Appellate counsel's second assignment of error was that the convictions were against the manifest weight of the evidence. The third assignment of error was that the trial court erred in denying the father's motion for new trial. As part of this argument appellate counsel proposed that the additional evidence would support a finding that the daughter had trespassed on the property, that the father had asked her to leave, and that the father was defending himself. During trial, defense counsel submitted the text messages between the father and the daughter. However, because they had not been turned over to the state during discovery, the judge did not permit their use. Thus, the fourth assignment of error was that the trial judge had erred in disallowing that evidence. Finally, appellate counsel argued that the trial court erred in issuing a no-contact order as part of the sentence.

{¶ 14} Now the father argues that his appellate counsel should have argued that his trial counsel was ineffective for not arguing self-defense and defense of

home pursuant to the "Castle Doctrine" under R.C. 2901.05(B). That statute recognizes a person is allowed to act in self-defense and in defense of that person's residence. Furthermore, if there is evidence that tends to support that the person used force in self-defense or in defense of residence, then "the prosecution must prove beyond a reasonable doubt that the accused person did not use force in self-defense * * * or in defense of that person's residence * * *." Because the father presented evidence that he was repelling an intruder and acting in self-defense, trial counsel should have argued that pursuant to R.C. 2901.05(B) the state needed to prove beyond a reasonable doubt that the father did not act in self-defense or in defense of residence. The father further argues that few things are more outcome-determinative than the burden of proof. The failure to argue self-defense and defense of residence and to switch the burden of proof was a mistake. At the very least, it presents a genuine issue of whether the father received effective assistance of counsel.

{¶ 15} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); and *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456.

{¶ 16} In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The court noted that it is

all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge 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* at 689.

{¶ 17} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.

{¶ 18} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 19} In the present case, the father has not established prejudice. He has not undermined this court's confidence in the outcome of either the trial or the appeal. The trial judge made very clear that in this case of disputed testimony, the credibility of the witnesses and of the evidence determined the outcome. The judge believed the daughter and not the father. Arguing self-defense and defense of residence and allocating the burden of proof pursuant to R.C. 2901.05(B) would not have changed that credibility determination and would not have changed the outcome of the proceedings.

{¶ 20} Accordingly, this court denies the application to reopen.

EILEEN T. GALLAGHER, ADMINISTRATIVE JUDGE

ANITA LASTER MAYS, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR