[Cite as *State v. Palmer-Tesema*, 2020-Ohio-4291.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 107972
v.	:	
YOHANN PALMER-TESEMA,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: September 1, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-18-626287-A
Application for Reopening
Motion No. 539217

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Brandon A. Piteo, Assistant Prosecuting Attorney, *for appellee*.

G. Michael Goins, *for appellant*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Applicant, Yohann Palmer-Tesema, seeks to reopen his appeal in *State v. Palmer-Tesema*, 8th Dist. Cuyahoga No. 107972, 2020-Ohio-907. He

claims that appellate counsel was ineffective for failing to raise and argue the following two proposed assignments of error:

> I. Appellate counsel was ineffective for failing to assign as error that appellant's rape and kidnapping convictions were not supported by sufficient evidence.
>
> II. Appellate counsel was ineffective for failing to assign as error trial counsel's ineffectiveness for failure to fully investigate defendant's case, failure to interview potential witnesses, prepare for trial and obtain evidence for defendant to present at trial.

Finding no merit to his claims, his application for reopening is denied.

I. Procedural History and Factual Background

{¶ 2} Palmer-Tesema was convicted of six counts of rape related to three victims, S.L., N.D., and M.C. A jury also found him guilty of three counts of kidnapping, but those counts merged with related rape counts, and the state elected for sentencing on the rape counts. He received an aggregate 17-year prison sentence. Palmer-Tesema appealed his convictions to this court where he argued that the three separate incidents should not have been tried together and he was prejudiced by the joinder. He also argued that the court improperly included a sleep instruction in the jury instructions. Finally, he asserted that the court erred in allowing an amendment to the indictment in the midst of trial. This court, on March 12, 2020, overruled these assigned errors and affirmed Palmer-Tesema's convictions. *Palmer-Tesema*, 8th Dist. Cuyahoga No. 107972, 2020-Ohio-907, at ¶ 76.

{¶ 3} On June 9, 2020, through counsel, Palmer-Tesema filed a timely application for reopening asserting two proposed assignments of error. However,

because the application exceeded the page limit set forth in App.R. 26(B)(4), we provided him an opportunity to file a complying application, which he did on July 8, 2020. The state timely responded with a brief in opposition on August 5, 2020.

II. Law and Analysis

A. Standard for Reopening Under App.R. 26(B)

{¶ 4} App.R. 26(B) allows a criminal defendant to apply for "reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." The application "shall be granted if 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). Whether there is a genuine issue of ineffective assistance of appellate counsel is judged using the same two-prong standard for ineffective assistance of trial counsel announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10, citing *State v. Sheppard*, 91 Ohio St.3d 329, 330, 744 N.E.2d 770 (2001); *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998). The applicant

> "must prove that his counsel [was] deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal." *Sheppard*, 91 Ohio St.3d at 330, 744 N.E.2d 770, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. Moreover, to justify reopening his appeal, appellant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *Spivey*, 84 Ohio St.3d at 25, 701 N.E.2d 696.

Id. at ¶ 11.

B. Sufficiency of the Evidence

{¶ 5} Palmer-Tesema first argues that appellate counsel was ineffective for not challenging his convictions based on insufficient evidence.

{¶ 6} A reviewing court addressing whether the evidence was sufficient for conviction must "examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "The 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." *Id*. Unlike a manifest weight challenge, a reviewing court does not assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

1. Rape

{¶ 7} The rape of a substantially impaired person is prohibited by R.C. 2907.02(A)(1)(c). It provides in pertinent part,

> No person shall engage in sexual conduct with another * * * when any of the following applies: * * * The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or

> consent is substantially impaired because of a mental or physical condition or because of advanced age.

{¶ 8} Palmer-Tesema initially claims the state produced insufficient evidence of substantial impairment and insufficient evidence that he knew or should have known about the victims' substantial impairment.

{¶ 9} "Substantially impaired" is not defined in the statue. Therefore, "the term must be given the meaning generally understood in common usage." *State v. Zeh*, 31 Ohio St.3d 99, 103, 509 N.E.2d 414 (1987). The state can show substantial impairment by offering evidence "demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of [her] conduct or to control [her] conduct." *Id*. at 103-104.

{¶ 10} Voluntary intoxication is a mental or physical condition that could cause substantial impairment. *State v. Jones*, 8th Dist. Cuyahoga No. 101311, 2015-Ohio-1818, ¶ 43, citing *State v. Doss*, 8th Dist. Cuyahoga No. 88443, 2008-Ohio-449, ¶ 13. However, to rise to the level of criminal culpability, '"a person's conduct becomes criminal * * * only when engaging in sexual conduct with an intoxicated victim when the individual knows or has reasonable cause to believe that the victim's ability to resist or consent is *substantially* impaired because of voluntary intoxication."' (Emphasis sic.) *Doss* at ¶ 13, quoting *State v. Martin*, 12th Dist. Brown No. CA99-09-026, 2000 Ohio App. LEXIS 3649, 16 (Aug. 14, 2000).

> Whether an offender knew or had reasonable cause to believe the victim was impaired may be reasonably inferred from a combination of the victim's demeanor and others' interactions with the victim. *Jones*, 8th Dist. Cuyahoga No. 101311, 2015-Ohio-1818, at ¶ 43, citing *State v.*

> *Novak*, 11th Dist. Lake No. 2003-L-077, 2005-Ohio-563, ¶ 25. Evidence that should have alerted an offender to whether a victim was substantially impaired may include evidence that the victim was stumbling, falling, slurring speech, passing out, or vomiting. [*In re King*, 8th Dist. Cuyahoga Nos. 79755 and 79830, 2002-Ohio-2313,] ¶ 20; *State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, 927 N.E.2d 632, ¶ 50 (2d Dist.).

State v. Foster, 8th Dist. Cuyahoga No. 108340, 2020-Ohio-1379, ¶ 48. The victim's own testimony may be sufficient to establish substantial impairment. *Id.* at ¶ 45, citing *State v. Hansing*, 2019-Ohio-739, 132 N.E.3d 252, ¶ 13 (9th Dist.), citing *State v. Dasen*, 9th Dist. Summit No. 28172, 2017-Ohio-5556, ¶ 19.

{¶ 11} This court already determined that the state presented more than sufficient evidence to sustain the verdicts for each count of rape. *Palmer-Tesema*, 8th Dist. Cuyahoga No. 107972, 2020-Ohio-907, at ¶ 51. Therefore, the failure to raise a sufficiency argument cannot result in prejudice, and this portion of Palmer-Tesema's first proposed assignment of error cannot result in reopening. Even so, when we apply the above standards to the facts of this case and the arguments raised in the application for reopening, we reach the same conclusion.

{¶ 12} Palmer-Tesema describes the evidence as insufficient to prove substantial impairment in his application for reopening. But later, he acknowledges the limits of his argument:

> While the aforementioned evidence may be sufficient to establish all three alleged victims' intoxication and may have even been sufficient to show S.L.; [sic] N.D. and M.C. were substantially impaired at the time of the sexual conduct, the law also requires the state to produce legally sufficient evidence to show that Palmer-Tesema knew or had cause to believe that S.L.; [sic] N.D. and M.C. were substantially impaired.

(Amended application for reopening, page 5.) In effect, Palmer-Tesema admits that there exists legally sufficient evidence of substantial impairment, except for the element of his knowledge of substantial impairment.

a. Evidence of Knowledge of Substantial Impairment of S.L.

{¶ 13} First we turn to the testimony of Palmer-Tesema's knowledge of S.L.'s substantial impairment.

{¶ 14} Brandon Thompson, Palmer-Tesema's former roommate at a Bay Village home, testified that on the night S.L. alleged that Palmer-Tesema raped her, he observed Palmer-Tesema and another roommate carry S.L. up the stairs to Palmer-Tesema's bedroom because S.L. was incapable of walking. (Tr. 648.) He described her as "pretty drunk," with slurred words, an inability to walk, and "blacked out or so." (Tr. 650.) This testimony alone is enough to satisfy the state's burden of proving Palmer-Tesema's knowledge of S.L.'s substantial impairment. While Palmer-Tesema claims that there is insufficient evidence that he knew or had reasonable cause to belief that S.L. was substantially impaired, this is clearly not the case based on the testimony adduced. Carrying someone who was described as "blacked out" to your bedroom certainly meets the "knows or has reasonable cause to believe" of the victim's substantial impairment for the crime when viewed in a light most favorable to the state.

{¶ 15} Palmer-Tesema claims he did not have sex with S.L. S.L.'s testimony, together with DNA and other evidence obtained during S.L.'s examination by a sexual assault nurse examiner ("SANE") and admitted at trial provide sufficient

evidence establishing all the elements of rape of a substantially impaired person when viewed in a light favorable to the state.

b. Evidence of Knowledge of Substantial Impairment of N.D.

{¶ 16} N.D. testified that, on November 29, 2017, she was drinking at Palmer-Tesema's house for approximately three to three-and-a-half hours prior to going out to a bar with him, Tia McCord, and another person. (Tr. 911.) They were at the bar drinking together for another two-and-a-half to three hours. She did not remember leaving the bar. McCord testified that N.C. appeared more intoxicated than usual. (Tr. 974.) She appeared very drunk. (Tr. 975.) N.D.'s next memory was talking to McCord in the bathroom at the Bay Village home shared by Palmer-Tesema and his former roommates after arriving there from the bar. She then went to bed alone in Palmer-Tesema's bed fully clothed. (Tr.914.) She was roused from sleep on her stomach with someone penetrating her from behind. (Tr. 915.) She later observed that it was Palmer-Tesema who was performing various sexual acts on her. (Tr. 916.)

{¶ 17} This court must note the distinction between cases where a defendant is a stranger to the level of intoxication of an individual and those where the defendant had knowledge or planned the intoxication of the victim. We recognized such a distinction in *Foster*:

> This case contrasts with cases where the defendant supplied alcohol that led to a victim's impairment, had knowledge of the alcohol consumed by the victim that led to her impairment, or set into motion a situation where the victim ended up with the defendant, all the while knowing the victim was impaired. *See, e.g., State v. Gardner*, 8th Dist.

> Cuyahoga No. 107573, 2019-Ohio-178o (defendant asked the victim, a co-worker in a restaurant, to join him for drinks, and the rape incident occurred afterwards); [*State v.*] *Freeman*, 8th Dist. Cuyahoga No. 95511, 2011-Ohio-2663 (the defendant set into motion a scenario where a 15-year-old victim ended up in the defendant's van where he supplied potent drugs to her); *King*, 8th Dist. Cuyahoga Nos. 79830 and 79755, 2002-Ohio-2313 (the minor victim was served a substantial amount of alcohol by the defendant).

*Foste*r, 8th Dist. Cuyahoga No. 108340, 2020-Ohio-1379, at ¶ 55. Here, Palmer-Tesema was aware of the amount of alcohol N.D. consumed and was aware or had reasonable cause to believe that N.D. was substantially impaired based on her state of intoxication, as others with N.D. that night described her as "very drunk."

{¶ 18} The state presented sufficient evidence, when viewed in a light most favorable to it, that Palmer-Tesema knew or should have known of N.D.'s substantial impairment.

c. Evidence of Knowledge of Substantial Impairment of M.C.

{¶ 19} M.C. testified on January 14, 2018, she had been drinking throughout the day and went to the Bay Village home for a safe place to sleep. After recounting her movements to various bars throughout the day and how much she had to drink, she remembers being in the kitchen of the home talking to Palmer-Tesema. Palmer-Tesema's former roommate testified that she was drunk when she arrived at the home, even though his other testimony indicated that his interactions with her that night were minimal. (Tr. 1125.) She next remembers waking up with her head resting on the toilet in the bathroom. (Tr. 806.) She could not walk normally up the steps, but was "bear-crawling" up the stairs to Palmer-Tesema's bedroom and fell

asleep in the bed. *Id*. She fell asleep fully clothed. (Tr. 807.) She woke up to Palmer-Tesema's digitally penetrating her. *Id*. She testified that Palmer-Tesema also had oral and vaginal intercourse with her. *Id.* She testified that she told him to stop numerous times but he did not. (Tr. 808.)

{¶ 20} In this instance, Palmer-Tesema may not have been aware of the amount of alcohol that M.C. had consumed throughout the day, but her testimony regarding her physical state and the observation of others evidenced significant impairment. Further, unlike *Foster*, the state presented evidence of second state of impairment as explained below. See *Foster*, 8th Dist. Cuyahoga No. 108340, 2020-Ohio-1379, at ¶ 59 (noting that the state did not present evidence of sleep).

d. Sleep

{¶ 21} Palmer-Tesema's application for reopening focuses only on his knowledge of the substantial impairment of the victims based on voluntary intoxication. He does not address a second condition of substantial impairment that is present in this case: Sleep.

{¶ 22} "[S]leep constitutes a mental or physical condition that substantially impairs a person from resisting or consenting to sexual conduct. When a person is asleep, he or she is not in a mental condition to resist or consent to the sexual conduct." *State v. Clark*, 8th Dist. Cuyahoga No. 90148, 2008-Ohio-3358, ¶ 21. *See also State v. Keller*, 8th Dist. Cuyahoga No. 106196, 2018-Ohio-4107, ¶ 25.

{¶ 23} As the state points out in its brief in opposition, N.D. and M.C. testified that they were awoken from sleep by Palmer-Tesema performing various

sex acts on them. Both testified that they were asleep and did not consent to such acts. This court affirmed the issuance of a sleep jury instruction in the direct appeal. *Palmer-Tesema*, 8th Dist. Cuyahoga No. 107972, 2020-Ohio-907, at ¶ 56-66. Further, that instruction was not limited to any specific victim. *Id*. at fn. 2. When viewing this testimony in a light most favorable to the state, it is clear that the state presented sufficient evidence that Palmer-Tesema knew or had reason to believe that these victims were asleep and incapable of consenting to the sexual acts Palmer-Tesema perpetrated on them.

{¶ 24} In order for a claim of ineffective assistance of appellate counsel to succeed, Palmer-Tesema is required to demonstrate that there is a reasonable probability of successfully arguing his proposed assignment of error. Palmer-Tesema does not address the evidence of sleep as a condition of substantial impairment or argue why such evidence is not sufficient to support his rape convictions when viewed in a light most favorable to the state. This, together with the evidence of substantial impairment due to intoxication for S.L., N.D., and M.C. shows that the state presented sufficient evidence for the rape convictions. Therefore, he has not set forth a colorable claim of ineffective assistance of appellate counsel in relation to the sufficiency of the evidence supporting his rape convictions.

2. Kidnapping

{¶ 25} Palmer-Tesema also claims that appellate counsel was ineffective for failing to raise a sufficiency-of-the-evidence claim regarding the kidnapping charges that were merged into the rape charges prior to sentencing. However, a sufficiency

analysis is only appropriate for each conviction. *State v. McFarland*, Slip Opinion No. 2020-Ohio-3343, ¶ 25, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 24; *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 138 (merger of kidnapping count with aggravated-robbery and aggravated-burglary counts moots a sufficiency-of-the-evidence claim regarding the kidnapping count). A conviction requires a finding of guilt and the imposition of sentence. *Whitfield* at ¶ 24.

{¶ 26} Here, because the kidnapping counts merged with the rape counts and the state elected to have Palmer-Tesema sentenced on the rape counts, a sufficiency argument for the kidnapping counts is moot. Palmer-Tesema could not have been prejudiced by appellate counsel's failure to raise this issue. As a result, he has not presented a colorable claim of ineffective assistance of appellate counsel regarding his first proposed assignment of error.

C. Ineffective Assistance of Trial Counsel

{¶ 27} Palmer-Tesema claims that appellate counsel should have assigned as error ineffective assistance of trial counsel for counsel's failure to investigate the case and present a proper defense.

{¶ 28} "Reversal of a conviction for ineffective assistance of counsel requires that the defendant show first that counsel's performance was deficient and second that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 74, citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 29} Palmer-Tesema identifies four potential witnesses that he claims he told trial counsel about. He further claims that trial counsel failed to interview these witnesses or determine whether they could aid the defense. Palmer-Tesema does not indicate where in the record defense counsel was made aware of these potential witnesses or any indication that defense counsel did not interview them and deem their testimony unhelpful to the defense. He does include statements to that effect in his affidavit in support of his application to reopen. Apart from rehashing the joinder arguments made in the direct appeal, the instances that Palmer-Tesema uses to attempt to illustrate trial counsel's ineffectiveness do not appear in the record and therefore cannot successfully be raised on appeal. *State v. Bays*, 87 Ohio St.3d 15, 28, 716 N.E.2d 1126 (1999).

{¶ 30} A failure of defense counsel to conduct a thorough investigation of a case is a claim often raised in postconviction proceedings because the argument generally relies on information not contained in the appellate record. *State v. Cooperrider*, 4 Ohio St.3d 226, 228, 448 N.E.2d 452 (1983); *State v. Coleman*, 85 Ohio St.3d 129, 134, 707 N.E.2d 476 (1999). While an application for reopening has been described as a specialized postconviction proceeding, *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 26, the proposed assignments of error must still be based on and supported in the record. *State v. Bridges*, 8th Dist. Cuyahoga No. 100805, 2015-Ohio-1447, ¶ 13. "'Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added

material.'" *Id.* at ¶ 9, quoting *State v. Moore*, 93 Ohio St.3d 649, 650, 758 N.E.2d 1130 (2001).

{¶ 31} Even though App.R. 26 provides a method to introduce evidence by way of affidavit and evidentiary hearing, the relief that a court may grant in reopening is limited. App.R. 26(B)(7) provides, "If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered." If this court were to grant reopening and assign counsel, the remedy would be to allow counsel to argue an assignment of error that could not properly be raised on appeal because it depends on matters that do not appear in the record.

{¶ 32} Further, some claims made in Palmer-Tesema's affidavit in support are contradicted by the record. Palmer-Tesema avers that defense counsel did not meet with him to go over discovery materials. (Affidavit in support of amended application for reopening, paragraph 7.)

{¶ 33} While Palmer-Tesema was present in the courtroom, defense counsel requested a continuance of the trial date on the record. After discussing an issue obtaining previously disclosed discovery materials from prior defense counsel, defense counsel stated that "[Palmer-Tesema] and I met on Wednesday for several hours and began to go over that. My schedule, because of a federal court hearing, didn't allow me to meet with him again until Saturday. We did so then. We reviewed

all these materials. I met with [Palmer-Tesema] as well as with his mother and his aunt." (Tr. 18.) Defense counsel elaborated:

> As the Court is aware, he is on GPS and home detention so we have to schedule meetings. Obviously it's "Counsel Only" most of them, so I can't give them to him. I have had them since Wednesday. I have reviewed them. And again, I believe the issue here is my client would like more time to digest them to make sure he properly understands his options.

(Tr. 19.) The trial court ultimately granted the continuance to give Palmer-Tesema more time to digest the discovery materials that were reviewed with counsel. Palmer-Tesema did not contradict any of these statements at the time they were made or otherwise indicate that these meetings did not occur. All of this casts serious doubt on the veracity of the statements made in Palmer-Tesema's affidavit.

{¶ 34} Palmer-Tesema has failed to present a colorable claim of ineffective assistance of appellate counsel for counsel's failure to assign as error an issue that requires reference to matters outside the record on appeal. Therefore, Palmer-Tesema's application for reopening is denied.

{¶ 35} Application denied.

KATHLEEN ANN KEOUGH, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR