[Cite as *State v. Saur*, 2013-Ohio-1674.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-1195
v.	:	(C.P.C. No. 10CR-03-1932)
Ronald L. Saur,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 25, 2013

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Ronald L. Saur, pro se.

ON APPLICATION FOR REOPENING

CONNOR, J.

{¶ 1} Defendant-appellant, Ronald L. Saur ("defendant"), has filed a pro se application, pursuant to App.R. 26(B), seeking to reopen his appeal resolved in this court's decision in *State v. Saur*, 10th Dist. No. 10AP-1195, 2011-Ohio-6662. Plaintiff-appellee, the State of Ohio ("State"), filed a memorandum in opposition to defendant's application. Because defendant's application fails to present a genuine issue that he was deprived of the effective assistance of appellate counsel, we deny his application to reopen.

{¶ 2} On March 26, 2010, defendant was indicted on charges of kidnapping, felonious assault, and domestic violence. On October 18, 2010, defendant entered a plea of guilty to felonious assault. Pursuant to the plea agreement, the other two offenses

were dismissed. At the plea hearing, the State set forth its factual basis for the plea. According to the facts set forth at the plea hearing, at approximately 2:00 a.m. on March 17, 2010, defendant's wife, Laurie Kresting-Saur ("Laurie"), called the police due to an argument with defendant. The police responded, but because there had been no actual violence at that time, the police did not arrest anyone and only arranged for appellant to leave the apartment. A short time later, appellant returned to the apartment and became violent. Appellant threw a cell phone at Laurie and hit her in the mouth. During a two-hour period of time, appellant struck Laurie repeatedly. He forced her to take a shower and tied her up on the bed to stop her from running away.

{¶ 3} Laurie was eventually able to free herself, so she ran into the hallway. Defendant followed her and dragged her back into the apartment by her hair. A neighbor heard her screams in the hallway and called 911. Once she was inside the apartment again, appellant threw Laurie on the floor of the bedroom, sat on her chest, and held her down, covering her mouth and nose with his hand while choking her and stating he was going to kill her. When the police arrived they arrested defendant and took Laurie to Grant Hospital, where Laurie remained for several days due to the severity of her injuries.

{¶ 4} At the plea hearing, the trial court engaged in a plea colloquy with defendant and accepted defendant's guilty plea. The court ordered a presentence investigation.

{¶ 5} At the sentencing hearing, a victim witness assistant read a statement from Laurie into the record. Defense counsel presented the court with mitigating evidence, and defendant personally addressed the court. The trial court sentenced defendant to an eight year prison term, the maximum prison sentence possible for a second degree felony felonious assault charge, explaining "[t]hat woman took a hell of a beating that night. That's why you got the maximum sentence." (Nov. 29, 2010, Tr. 16.)

{¶ 6} In his direct appeal, defendant, through counsel, raised two assignments of error. He argued that his sentence was contrary to law and that his trial counsel rendered ineffective assistance of counsel. Defendant asserted his sentence was contrary to law for the following reasons: (1) the trial court violated the conservation of resources principle set forth in R.C. 2929.13(A), (2) the trial court erred in making a

factual finding that the offense at issue was "the worst form of the offense" following the Supreme Court of Ohio's severance of the sentencing statutes in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, (3) the sentence violated principles of consistency and proportionality, (4) the trial court failed to properly consider or weigh the factors in R.C. 2929.12 and put too much emphasis on the victim's injuries, and (5) the trial court abused its discretion in failing to waive the costs in the action. Defendant alleged his trial counsel was ineffective in failing to object to the court's sentence on the various grounds outlined above. In a decision rendered on December 22, 2011, this court overruled defendant's assignments of error and affirmed the judgment of the Franklin County Court of Common Pleas.

{¶ 7} On January 25, 2012, defendant filed a handwritten document with this court, consisting of an affidavit and a memorandum in support. Defendant averred that the statements in the affidavit were made "in support of [defendant's] application to reopen in Accordance with Appellate Rule 26(B)." On February 1, 2013, this court issued a judgment entry construing defendant's January 25, 2012 filing as an App.R. 26(B) motion and ordering the clerk to note the docket accordingly.[1] On February 7, 2013, the State filed a motion for leave to file a memorandum opposing defendant's application, which we granted.

{¶ 8} App.R. 26(B) allows applications to reopen an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1) provides that an application for reopening shall be filed within 90 days from the journalization of the appellate judgment. Here, defendant has filed a timely application.

{¶ 9} An application for reopening must set forth "[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). The application must also contain a sworn statement setting forth the basis

[1] This court's journal entry mistakenly referred to defendant's January 25, 2012 filing as being filed on January 25, 2013.

of the claim alleging that appellate counsel's representation was deficient and the manner in which the deficiency prejudiced the outcome of the appeal. App.R. 26(B)(2)(d). 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).

{¶ 10} To prevail on an application to reopen, defendant must make "a colorable claim" of ineffective assistance of appellate counsel under the standard established in *Strickland v. Washington,* 466 U.S. 668 (1984). *See State v. Lee,* 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶ 2, citing *State v. Sanders*, 75 Ohio St.3d 607 (1996). Under *Strickland,* defendant must demonstrate the following: (1) counsel was deficient in failing to raise the issues defendant now presents, and (2) defendant had a reasonable probability of success if the issue had been presented on appeal. *Lee* at ¶ 2, citing *State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991.

{¶ 11} An appellate attorney has wide latitude and the discretion to decide which issues and arguments will prove most useful on appeal. Furthermore, appellate counsel is not required to argue assignments of error that are meritless. *Lee* at ¶ 3, citing *State v. Lowe*, 8th Dist. No. 82997, 2005-Ohio-5986, ¶ 17.

{¶ 12} Defendant's application alleging his appellate counsel was ineffective lacks clear assignments of error. Defendant's affidavit contains the following averments:

> [1.] My appellate counsel was ineffective for failing to properly research and argue on appeal: I was denied due process by the trial court by not being properly addressed personally. I was never told the nature or elements of my charge.
>
> [2.] I was substantially prejudiced because these errors were not raised and could have resulted in receiving a new trial and could have been brought to light and supported.
>
> [3.] Appellates [sic] counsel failure to raise these facts on appeal constitutes ineffective assistance of counsel.
>
> [4.] Appellates [sic] counsel failure to recognize ineffective assistance of trial counsel constitutes ineffective [sic] of counsel.

{¶ 13} Based upon our reading of defendant's application, he appears to assert that his appellate counsel was ineffective by failing to raise the following assignments of error on appeal: (1) defendant's guilty plea was involuntary because the trial court did not ascertain during the plea colloquy whether defendant understood the nature of the charge, and (2) defendant's trial counsel was ineffective in failing to inform defendant about the inferior offense of aggravated assault.

I. NATURE OF THE CHARGES

{¶ 14} Defendant asserts that he did not knowingly enter his guilty plea because he "did not possess a full understanding of the law in relation to the facts." (Application to Reopen, 1.) Defendant claims the trial court, in violation of Crim.R. 11(C)(2)(a), did not address him "personally to determine that the defendant [was] making the plea voluntarily and knowingly with an understanding of the nature of the charges and the maximum penalty involved." (Application to Reopen, 4.)

{¶ 15} The record does not support defendant's contentions. Pursuant to Crim.R. 11(C)(2), a court may not accept a guilty plea in a felony case without first addressing the defendant personally and doing the following:

> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶ 16} "The mandate that the defendant must be informed of the nature of the charges is a non-constitutional right." *State v. Smith*, 10th Dist. No. 10AP-143, 2010-Ohio-4744, ¶ 14. For the non-constitutional rights in Crim.R. 11, the trial court must substantially comply with the mandates of Crim.R. 11. *Id.*, citing *State v. Nero*, 56 Ohio St.3d 106, 108 (1990). " 'Substantial compliance' means that, under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Id.*, quoting *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 15, citing *Nero* at 108. Furthermore, a defendant who challenges his guilty plea on the basis that the advisement for the non-constitutional rights did not substantially comply with Crim.R. 11(C)(2)(a) must also show a prejudicial effect, meaning the plea would not have been otherwise entered. *Id.*

{¶ 17} Here, defendant asserts the trial court erred in accepting his plea without addressing him personally to determine if he understood the nature of the charges and the maximum penalty involved. "However, Crim.R. 11(C)(2)(a) does not require a trial court to provide a detailed explanation of the elements of the charges against a defendant." *Smith* at ¶ 16, citing *State v. Fitzpatrick*, 102 Ohio St.3d 331, 2004-Ohio-3167, ¶ 56-57, citing *Henderson v. Morgan*, 426 U.S. 637 (1976). As a general rule, this court has determined that a guilty plea is made with an understanding of the nature of the charges when: (1) a defendant is addressed in court and informs the court that he understands what he is pleading guilty to, (2) his signed guilty plea states that he has reviewed the law and the facts with his counsel, and (3) counsel advises the court that he has reviewed the facts and the law with his client and that his client has read the plea form. *State v. Dingess*, 10th Dist. No. 02AP-150, 2002-Ohio-6450, ¶ 45 (finding the defendant's "guilty pleas were knowingly, voluntarily and intelligently made" where the defendant "signed the plea forms, and his counsel informed the trial court that counsel fulfilled his obligations of representing appellant pursuant to the guilty plea forms").

{¶ 18} The transcript of the plea hearing demonstrates that the trial court engaged in a proper Crim.R. 11 plea colloquy with defendant. At the beginning of the hearing, the State noted that defendant was changing his plea from not guilty to "guilty to Count 1 of the indictment, Felonious Assault, a felony of the second degree, in violation of Revised Code Section 2903.11. The maximum prison term is eight years."

(Oct. 18, 2010, Tr. 2.) Defendant stated he understood that he was pleading guilty to felonious assault, and that in exchange for his plea the State would nolle prosequi the kidnapping and domestic violence charges. The court informed defendant that "the maximum penalty" for second degree felony felonious assault was "eight years in the penitentiary and a fine not to exceed $15,000." (Oct. 18, 2010, Tr. 4.) Accordingly, the court properly instructed defendant regarding the maximum penalty.

{¶ 19} The court further noted it had before it defendant's signed guilty plea form. The court asked defendant "Did you go over the document with [your attorney] Mr. Hunt before you signed it?" (Oct. 18, 2010, Tr. 3.) Defendant responded "Yes, sir." (Oct. 18, 2010, Tr. 3.) After reviewing with defendant the various sanctions which might accompany his plea, including the mandatory term of post-release control, and reviewing the constitutional rights listed in Crim.R. 11(C)(2)(c), the court inquired:

> The Court: Mr. Hunt, you've had an opportunity to review the form with your client. Do you feel he is knowingly, intelligently, and voluntarily proceeding?
>
> Mr. Hunt: Absolutely.
>
> The Court: Do you feel this plea arrangement's in his best interest?
>
> Mr. Hunt: Yes, Your Honor.
>
> The Court: Have you discharged your duties pursuant to the Ohio Criminal Rules in representing you client?
>
> Mr. Hunt: I have, Your Honor.
>
> The Court: Are you satisfied with his representation?
>
> The Defendant: Yes, sir.
>
> The Court: Has he answered all your questions?
>
> The Defendant: Yes, sir.
>
> The Court: Done you a good job?
>
> The Defendant: Excellent.

(Oct. 18, 2010, Tr. 11.)

{¶ 20} The court accepted defendant's guilty plea, noting:

> The Court: I'll find the Defendant knowingly, intelligently entered a plea with a full understanding of the various consequences, including the maximum penalty.
>
> I'll further find Mr. Saur and I had a discussion on the record. I was very pleased. He was very attentive. He appeared to understand his rights and knowingly and voluntarily gave them up.
>
> Is that correct, Mr. Saur?
>
> The Defendant: That's correct, sir.

(Oct. 18, 2010, Tr. 14.)

{¶ 21} Based on the foregoing, it is apparent the trial court substantially complied with Crim.R. 11(C)(2). Although the court did not specifically ask defendant if he understood the nature of the offense, defendant informed the court that he understood he was pleading guilty to felonious assault, defendant's signed guilty plea form stated that defendant had reviewed the facts and law of his case with his attorney, and defendant's attorney informed the court that he had reviewed the plea form with defendant and that he had discharged his duties pursuant to the Ohio Criminal Rules. Accordingly, defendant's appellate counsel was not deficient in failing to raise an assignment of error based on the trial court's failure to inform defendant of the nature of the offense, as defendant has failed to establish a reasonable probability of success on such a claim. *See also Smith* at ¶ 17 (finding where "the written plea was signed by appellant and his attorney and indicated that appellant had reviewed the facts and law of his case with his counsel," that statement in the plea form "combined with appellant's answers to the court's questions and the recitations at the plea hearing establishe[d] that appellant understood the nature of the attempted felonious assault offense").

{¶ 22} The record reveals that the trial court properly advised defendant pursuant to Crim.R. 11 at the sentencing hearing. Accordingly, defendant has not presented a colorable claim of ineffective assistance of appellate counsel regarding the

trial court's failure to advise defendant of the nature of the charges against him pursuant to Crim.R. 11(C)(2)(a).

II. AGGRAVATED ASSAULT

{¶ 23} Defendant asserts "that his version of the facts supported an affirmative defense of aggravated assault R.C. 2903.12 a fourth degree felony," and alleges that had he "known the essential elements of the charges against him he would have gone to trial believing that a jury would have found him guilty of F-4 aggravated assault." (Application to Reopen, 1, 7.) Defendant contends his trial counsel's performance was deficient because "trial counsel only presented the elements of felonious assault to his client and never presented to him the mitigating factor of provocation," thus leading defendant "to believe there was no effective defense." (Application to Reopen, 12.)

{¶ 24} Defendant pled guilty to felonious assault, which prohibits any person from knowingly causing serious physical harm to another. R.C. 2903.11. Aggravated assault prohibits any person from knowingly causing serious physical harm to another, "while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force." R.C. 2903.12. A conviction for felonious assault is a felony of the second degree, and carries a maximum prison sentence of eight years. A conviction for aggravated assault is a felony of the fourth degree, and the maximum prison sentence is 18 months. R.C. 2929.14.

{¶ 25} At the sentencing hearing, defendant's trial counsel presented facts in mitigation. Defense counsel noted that:

> Mr. Saur's has always maintained that he in no way ever even attempted to or came close to tying her up or kidnapping her in any form or fashion. * * * [T]his was an event that took place over a period of time after they had gotten into a verbal argument, that she had a large commercial stapler and was hitting him over the head with it.
>
> Again does that give him the right to punch her in the face? Probably not, or we would not have pled.

(Nov. 29, 2010, Tr. 7-8.)

{¶ 26} Defendant asserts that, because Laurie hit him on the head with a commercial stapler, the element of serious provocation was present in this case. Defendant contends that, after the trial court became aware of defendant's version of the facts at the sentencing hearing, "[i]t was incumbent of the trial court to invalidate the plea and inform the defendant of the elements of the statute to which he was arguing, aggravated assault because of the serious provocation." (Application to Reopen, 1-2.) However, absent a motion to vacate his plea, pursuant to Crim.R. 32.1, the trial court could not sua sponte vacate defendant's guilty plea. *See State v. Millhouse*, 8th Dist. No. 79910, 2002-Ohio-2255, ¶ 27 (noting that "the Rules of Criminal Procedure reveals no provisions which would suggest that a trial court should sua sponte vacate a guilty plea once it has been accepted").

{¶ 27} Defendant asserts that his guilty plea was not "made knowingly or voluntarily" as the trial court failed to make defendant "aware [of] the nature of the charge or the essential elements * * * of provocation" during the plea colloquy. (Application to Reopen, 14.) However, defendant cites to nothing to support his contention that the trial court had an obligation to inform defendant during the plea colloquy about the elements of an offense to which defendant was not pleading guilty. *Compare State v. Jefferson*, 8th Dist. No. 95949, 2011-Ohio-4951, ¶ 4, 8 (where the defendant asserted error because the trial court did not inform him "of the effect and potential consequences of his guilty pleas" relative to other charges pending against the defendant, the appellate court concluded the trial court "had no responsibility to explain to Jefferson the potential effect of guilty pleas in subsequent potential cases").

{¶ 28} Defendant's main contention that his trial counsel was ineffective in failing to inform defendant of the elements of aggravated assault would require evidence of conversations between defendant and his counsel from outside the record. "When allegations of ineffective assistance of counsel hinge on facts not appearing in the record, the proper remedy is a petition for post-conviction relief rather than a direct appeal." *State v. Davis*, 10th Dist. No. 05AP-193, 2006-Ohio-193, ¶ 19. Even so, the following statements from counsel at the sentencing hearing strongly indicate that counsel discussed potential defenses and potential lesser included or inferior offenses with defendant before defendant decided to plead guilty to felonious assault:

> And we spent a lot of time going over whether we were going to try this case or not *as to what our possible defenses were*, and the Court properly inquired about that at the plea.
>
> However, with that said, after viewing the same photographs that the Court's going to and has viewed, after going over both case law and the statute itself regarding felonious assault, my client made, what I believe to be, a very informed decision, was very patient about what, you know, the best advice would be for him rather than jumping to conclusions that this wasn't a felonious assault or, you know, *it may be something less than that*. He studied every piece of information the State provided and also all the case law and, again, statutory law that I provided him regarding felonious assault, and he made an informed decision that he believed at trial the jury would, in fact, find him guilty of a felonious assault, and that's why he plead to it.

(Emphasis added.) (Nov. 29, 2010, Tr. 8-9.)

{¶ 29} Moreover, the facts contained in the record before us do not demonstrate that defendant would have been entitled to an instruction on aggravated assault had he gone to trial. The offense of aggravated assault is an inferior degree of felonious assault because its elements are identical to or contained within the offense of felonious assault, coupled with the additional presence of one or both mitigating circumstances of sudden passion or a sudden fit of rage brought on by serious provocation occasioned by the victim. *See State v. Stewart*, 10th Dist. No. 10AP-526, 2011-Ohio-466, ¶ 7, citing *State v. Logan*, 10th Dist. No. 08AP-881, 2009-Ohio-2899, fn.1, citing *State v. Deem*, 40 Ohio St.3d 205 (1988). In other words, aggravated assault is the same conduct as felonious assault but its nature and penalty are mitigated by provocation. *Stewart* at ¶ 7, citing *State v. Scott*, 10th Dist. No. 00AP-868 (Mar. 27, 2001).

{¶ 30} Although aggravated assault is an inferior offense of felonious assault, rather than a lesser-included offense, the Supreme Court of Ohio held in *Deem* that, in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation, an instruction on aggravated assault must be given. *Stewart* at ¶ 8, citing *Deem* at 211. The test for whether the trial court should instruct the jury on aggravated assault when the defendant is charged with felonious assault is the same test applied when an instruction on a lesser-included offense is sought. *Id.*, citing *State v.*

McClendon, 2d Dist. No. 23558, 2010-Ohio-4757, ¶ 18, citing *State v. Shane,* 63 Ohio St.3d 630 (1992). The instruction must be given when the evidence presented at trial would reasonably support both an acquittal on the charged crime of felonious assault and a conviction for aggravated assault. *Stewart* at ¶ 8. Thus, a jury instruction should be given for an inferior offense, if under any reasonable view of the evidence, and when all of the evidence is construed in a light most favorable to the defendant, a reasonable jury could find that the defendant had established by a preponderance of the evidence the existence of one or both of the mitigating circumstances. *Id.*, citing *State v. Rhodes*, 63 Ohio St.3d 613, 617-18 (1992).

{¶ 31} Serious provocation under R.C. 2903.12 means provocation "reasonably sufficient to bring on extreme stress and * * * reasonably sufficient to incite or to arouse the defendant into using deadly force." *Deem* at paragraph five of the syllabus, approving *State v. Mabry*, 5 Ohio App.3d 13 (8th Dist.1982). The provocation must be "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Shane* at 635. To determine whether the defendant presented sufficient evidence to warrant an instruction on the inferior offense of aggravated assault, "an objective standard must be applied to determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage." *State v. Mack*, 82 Ohio St.3d 198, 201 (1998). If this objective standard is met, the inquiry shifts to a subjective standard, to determine whether the defendant in the particular case " 'actually was under the influence of sudden passion or in a sudden fit of rage.' " *Id.*, quoting *Shane* at 634-35.

{¶ 32} Here the facts in the record do not support serious provocation. The facts demonstrate the following events: defendant and Laurie had a verbal argument in their apartment, the police arrived and arranged for defendant to leave the apartment, defendant attempted to drive away from the apartment but could not because the car did not have gas in it, defendant went back inside the apartment where the verbal altercation continued and escalated into a physical altercation. During the physical altercation defendant struck Laurie repeatedly, dragged her by her hair, and sat on top of her trying to choke her. At some point during these events, Laurie struck defendant with a commercial stapler.

{¶ 33} Although defendant asserts the element of serious provocation was present in this case, the facts do not indicate that Laurie started the physical altercation by striking defendant with the stapler. *See State v. Kehoe*, 133 Ohio App.3d 591, 610-11 (12th Dist.1999), citing *Shane* at 637 (noting that, because the provocation discussed in R.C. 2903.12 "must be occasioned by the victim," the evidence was insufficient to establish serious provocation where the facts indicated that defendant instigated the shoot-out with police, either by firing his weapon first or brandishing his weapon first). Moreover, to the extent the record indicates that a verbal argument preceded the physical argument between defendant and Laurie, "words alone generally do not constitute reasonably sufficient provocation to incite the use of deadly force." *State v. Glass*, 10th Dist. No. 04AP-140, 2004-Ohio-5843, ¶ 21, citing *Shane*. Finally, even if the facts did indicate that Laurie started the physical altercation by striking defendant with the stapler, it is questionable whether such conduct would constitute serious provocation sufficient to incite defendant to severely beat Laurie for two hours. *Compare Deem* at 211 (noting that "[t]he only evidence presented at trial of provocation of appellee Deem by the victim was the historically stormy relationship between the two and the alleged 'bumping' of Deem's car by the victim with her car," neither of which "was reasonably sufficient, as a matter of law, to incite or arouse appellee into repeatedly stabbing the victim, particularly given the time for reflection between the 'bumping' and the stabbing").

{¶ 34} Accordingly, because the record before us does not present facts to support the serious provocation element of aggravated assault, defendant has not demonstrated a reasonable probability of success on a claim of ineffective assistance of counsel based on trial counsel's alleged failure to inform defendant about the inferior offense of aggravated assault. Even if defendant's trial counsel had informed defendant about aggravated assault, and defendant had gone to trial, there is no indication that the trial court would have instructed the jury on aggravated assault. Moreover, because the claim of ineffective assistance of counsel based on trial counsel's failure to communicate the existence of an inferior offense to his client would necessarily require evidence from outside the record, appellate counsel cannot be considered deficient for failing to raise a meritless assignment of error. *Lee* at ¶ 3

III. CONCLUSION

{¶ 35} Based on the foregoing, we find defendant has failed to establish a genuine issue demonstrating that he was deprived of the effective assistance of counsel and that he suffered prejudice as a result of appellate counsel's performance. Consequently, we find defendant's proposed assignments of error to be without merit. Because defendant's arguments fail to establish a colorable claim of ineffective assistance of counsel, we deny defendant's application for reopening.

Application for reopening denied.

BRYANT and TYACK, JJ., concur.
