[Cite as *State v. Henderson*, 2019-Ohio-1760.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff- Appellee,

v.

HAKEEM HENDERSON,

Defendant- Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 16 MA 0057

Application to Reopen

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Denied.

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

Hakeem Henderson, pro se, A683-210, Northeast Ohio Correctional Center, 2240 Hubbard Road, Youngstown, Ohio 44505 for Defendant-Appellant.

Dated: April 29, 2019

PER CURIAM.

{¶1} For the following reasons, the application to reopen filed by Defendant-Appellant Hakeem Henderson is denied.

{¶2} Appellant was convicted in the Mahoning County Common Pleas Court of engaging in a pattern of corrupt activity and two counts of aggravated murder. On appeal, he raised five assignments of error involving: the use of testimonial hearsay under the forfeiture by wrongdoing exception to the confrontation clause; the refusal to sever his trial from his co-defendant's trial; the sufficiency of the evidence supporting complicity to aggravated murder; speedy trial time; and cumulative error. On November 30, 2018, this court affirmed his convictions. *State v. Henderson*, 7th Dist. No. 16 MA 0057, 2018-Ohio-5124, reconsideration denied, 2019-Ohio-130.

{¶3} On February 15, 2019, Appellant filed a timely application to reopen his appeal under App.R. 26(B). A criminal defendant may apply for reopening of his direct appeal based on a claim of ineffective assistance of appellate counsel by raising an assignment of error (or an argument in support of an assignment of error) that previously was not considered on the merits (or that was considered on an incomplete record) because of appellate counsel's deficient representation. App.R. 26(B)(1),(B)(2)(c). To warrant reopening (and the appointment of counsel for a reopened appeal), the application to reopen must demonstrate 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).

{¶4} This reopening inquiry utilizes the standard two-part test for ineffective assistance of counsel which requires a showing of both deficient performance and resulting prejudice. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 5, applying *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (if the performance was not deficient, then there is no need to review for prejudice and vice versa). On the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *State v.*

Carter, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶5} In evaluating an alleged deficiency in performance, our review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *Bradley*, 42 Ohio St.3d at 142-143 (there are "countless ways to provide effective assistance in any given case"), citing *Strickland*, 466 U.S. at 689. A court should not second-guess the strategic decisions of counsel. *Carter*, 72 Ohio St.3d at 558. Appellate counsel has wide discretion to choose the errors to be assigned on appeal and focus on the arguments perceived as the strongest. *See Tenace*, 109 Ohio St.3d 451 at ¶ 7, 9.

{¶6} "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal" as attempting to address too many issues can dilute the force of the stronger arguments. *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). We are guided by these principles in determining whether there "is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal" under App.R. 26(B)(5). *See also* App.R. 26(B)(2)(d) (a sworn statement must address the alleged deficiency and the manner in which the deficiency prejudicially affected the appeal).

{¶7} Appellant sets forth two proposed assignments of error in his application for reopening, the first of which provides: "The appellant's rights to due process and fair trial under the Fifth, Sixth and Fourteenth Amendment to the United States Constitution were violated by multiple instances of prosecutorial misconduct."

{¶8} When reviewing a claim of prosecutorial misconduct in closing arguments, the reviewing court evaluates whether remarks were improper and, if so, whether they prejudicially affected the defendant's substantial rights. *State v. Lott*, 51 Ohio St.3d 160,

165, 555 N.E.2d 293 (1990). The prosecution is afforded wide latitude in summation. *Id.* Contested statements made during closing arguments are not viewed in isolation but in context and considering the arguments in their entirety. *State v. Treesh*, 90 Ohio St.3d 460, 466, 739 N.E.2d 749 (2001).

{¶9} Appellant points to the prosecutor's statement that certain witnesses were "telling the truth" and the prosecutor's description of a witness's cross-examination as involving "desperation from the defense that they couldn't attack his account. Because it was bulletproof. Because it was the truth." (Tr. 1576, 1591-1592). Appellant concludes the state improperly vouched for the credibility of witnesses and attacked the integrity of defense counsel by suggesting he was desperate. On the latter topic, the prosecutor shall not denigrate or impute insincerity to defense counsel in the jury's presence. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 301. However, the characterization of certain questions asked of a witness as evincing a desperate *strategy* does not improperly denigrate defense counsel or cause prejudice.

{¶10} As to Appellant's vouching argument: "It is improper for a prosecutor to vouch for the credibility of a witness at trial. Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue. * * * An attorney may not express a personal belief or opinion as to the credibility of a witness." *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138 (2018) (characterization of witness's response as honest does not imply facts outside of the record or place the prosecutor's personal credibility at issue). The disputed statements did not imply facts outside of the record. The statements were made in the context of discussing the corroborating evidence or the evidence countering a witness's motive to lie. *See Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 120. To the extent a personal belief could be inferred, "Not every intemperate remark by counsel can be a basis for reversal." *State v. Landrum*, 53 Ohio St.3d 107, 112, 559 N.E.2d 710 (1990). The question is the fairness of trial, not the culpability of the prosecutor. *Id.* There is no reason to believe the jury did not follow the court's instruction that closing arguments were not evidence and that the jurors were the sole judges on the credibility of the witnesses. (Tr. 1673-1674). *See State v. Loza*, 71 Ohio St.3d 61, 79, 641 N.E.2d 1082 (1994) (it is presumed the jury will follow the instructions given by the judge).

{¶11} Finally, as no objections were entered during the state's initial closing argument, Appellant is essentially raising ineffective assistance of appellate counsel for failing to raise plain error or for failing to raise ineffective assistance of trial counsel (based on the failure to object to prosecutorial misconduct). A failure to object where an objection is available is not necessarily deficient performance. Exercising restraint during closing arguments is frequently a part of a trial strategy involving a desire to avoid interruption and to avoid drawing attention to certain statements. *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 90; *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 42; *State v. Clay*, 7th Dist. No. 08MA2, 2009-Ohio-1204, ¶ 141. Instances of debatable trial tactics generally do not constitute ineffective assistance of counsel. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 192.

{¶12} Appellant also points to the rebuttal portion of closing arguments stating the prosecutor made improper and prejudicial remarks when contesting a perceived defense theory that the state assisted in manufacturing facts to support the case. When the prosecutor continued criticizing the perceived theory by noting who all would have to be involved, the defense objected. The court sustained the objection and instructed the state to move forward with the argument. (Tr. 1648). The prosecutor thereafter gave examples of what a dishonest set of witnesses or investigators could have done to make the case stronger and concluded, "I mean, let's face it, if we're going to lie, let's really lie." (Tr. 1651). We note the state was speaking of its own witnesses.

{¶13} Also, this occurred in rebuttal, and the prosecutor's comments directly responding to arguments advanced by the defense are unlikely to constitute grounds for reversal. *State v. Miller*, 7th Dist. No. 17 MA 0120, 2018-Ohio-5127, ¶ 25. The closing argument presented by counsel for Appellant's co-defendant/brother asserted various witnesses manufactured stories to receive deals or for their own purposes. (Tr. 1622-1623, 1627-1628). It also suggested the police put pressure on witnesses to make certain statements that would help the state's case. (Tr. 1612-1613, 1621). The closing presented by Appellant's counsel stated a fatal flaw in the state's case was that the detective fed Appellant's name to a witness. (Tr. 1639-1640). The response by the state, even if exaggerated, does not give rise to concerns about a fair trial. Prejudice is not

apparent. Appellate counsel was not ineffective by failing to raise these issues with closing arguments.

{¶14} In the second proposed assignment of error, Appellant states: "Appellant's rights to due process and fair trial under the Fifth, Sixth, Fourteenth Amendments of the United States Constitution and Section 10 Article I of the Ohio Constitution were violated when the trial court overruled the request for a mistrial when a juror had unlawful contact with someone regarding this case during trial."

{¶15} Where there is claim that improper contact with a juror caused that juror or members of the jury to be biased, the defense must establish actual bias at the hearing on the topic. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 160. A trial court has broad discretion in dealing with the juror contact and determining whether to declare a mistrial; the granting of a mistrial is necessary only when a fair trial is no longer possible. *Id.*

{¶16} Appellant's application for reopening states: a juror was approached during trial; he tainted other jurors by discussing the encounter; some jurors felt intimidated and unsure of whether they could be impartial; and defense counsel unsuccessfully moved for a mistrial on these grounds. The trial court conducted a hearing on the matter. The reporting juror said he walked past a person who "very lightly" said, "You're on the jury? You gotta be fair." (Tr. 1035). This juror said he could be impartial and had no concerns, adding, "I did not take it severely at all." (Tr. 1036- 1037). Other jurors overheard him mentioning the event to another jury member.

{¶17} The court individually questioned the other jurors and informed them their addresses were not public, no photographs or cell phones were allowed in the courtroom, and deputies would escort them to their vehicles. In seeking a mistrial, defense counsel pointed to reservations expressed by two jurors on whether they could be fair and impartial. (Tr. 1091-1092). For instance, one juror was concerned that courtroom spectators stared at her in the parking lot. All jurors ultimately answered they could render a verdict solely on the evidence and be impartial. The court declared its satisfaction that the jury could be fair and impartial based on its evaluation of them during the independent questioning. (Tr. 1091). The trial judge was in the best position to observe the jurors as they were being questioned and was permitted to rely on the jurors' answers to the court

in determining impartiality. *See Conway*, 108 Ohio St.3d 214 at ¶ 163; *State v. Herring*, 94 Ohio St.3d 246, 259, 762 N.E.2d 940 (2002).

{¶18} In any event, although Appellant addressed the allegations surrounding his first proposed assignment of error in the affidavit attached to the application for reopening, his affidavit does not mention the allegations surrounding the second proposed assignment of error. An application for reopening shall contain a sworn statement addressing the alleged deficiency in appellate representation and the manner in which the deficiency prejudicially affected the outcome of the appeal. App.R. 26(B)(2)(d). Appellant has not shown a genuine issue of ineffective assistance of appellate counsel.

{¶19} For the foregoing reasons, Appellant's application to reopen is denied.

JUDGE CAROL ANN ROBB

JUDGE GENE DONOFRIO

JUDGE DAVID A. D'APOLITO

NOTICE TO COUNSEL

This document constitutes a final judgment entry.