

ORIGINAL

IN THE SUPREME COURT OF OHIO

11-1804

STATE OF OHIO,

: Supreme Court No. _____

Appellee,

: C.A. Case No. C-090876

V.

:

JOHNNY GAMBLE,

: On Appeal from the Court of Appeals for Hamilton County, Ohio.

Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOHNNY GAMBLE

Hamilton County Prosecutor's Office 1000 Main St. Cincinnati, Ohio 45202.

Attorney for Appellee

Johnny Gamble #618-728, Ross Correctional Institution, P.O. Box 7010 Chillicothe, Ohio 45601.

Appellant, Pro Se

FILED
OCT 20 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Explanation of why leave to appeal should be granted.....	1
Statement of the case and facts.....	1
Argument in support of proposition of law.....	5
<u>PROPOSITION OF LAW 1: THERE WAS ERROR IN THE COURT OF APPEALS IN DENYING APPELLANT'S APPLICATION FOR REOPENING, PURSUANT TO App. R. 26(B), APPELLANT RAISED A GENUINE ISSUE AS TO WHETHER HE WAS DEPRIVED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON APPEAL.....</u>	5
<u>SUB CLAIM ONE: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSIGN AS ERROR TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE..</u>	6
<u>SUB CLAIM TWO: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSIGN AS ERROR SEVERAL INSTANCES OF PROSECUTORIAL MISCONDUCT.....</u>	9
<u>SUB CLAIM THREE: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSIGN AS ERROR THE PROSECUTION'S USE OF EVIDENCE OBTAINED IN VIOLATION OF APPELLANT'S FOURTH AMENDMENT RIGHT AGAINST WARRANTLESS SEARCH AND SEIZURE.....</u>	12
<u>SUB CLAIM FOUR: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSIGN AS ERROR THE FACT THAT APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.....</u>	12
CONCLUSION.....	13
CERTIFICATE OF SERVICE.....	13
<u>APPENDIX</u>	
Court of Appeals' Entry Denying Application to Reopen.....	1

EXPLANATION OF WHY LEAVE TO
APPEAL SHOULD BE GRANTED

Leave to Appeal is being sought in this case for a determination of whether appellate counsel's representation could be classified as "ineffective" when counsel raises non-meritorious or weaker claims while allowing stronger meritorious claims to fall to the wayside.

STATEMENT OF THE CASE AND FACTS

PROCEDURAL POSTURE

On April 30, 2009 in case no. B-0902712-A, Defendant-Appellant Johnny Gamble, along with co-defendant, Kelvin Lovitt, was indicted for rape, kidnapping, aggravated robbery, and robbery. On September 2, 2009 in case no. B-0905976, Mr. Gamble was indicted for felonious assault. On September 2, 2009, a bench trial began in both cases, after Mr. Gamble was coerced into waiving his right to a jury trial. During the course of the trial, defense counsel made Rule 29 Motions for Acquittal which were denied by the trial court. The trial continued until October 29, when the trial court returned a verdict of guilty to all counts for Mr. Gamble and Mr. Lovett. On December 10, Mr. Gamble was sentenced to 18 years in case no. B-0902712-A, consecutive to 2 years in case no. B-0905976, for a total of 20 years. After his conviction and sentence was upheld by the Hamilton County Court of Appeals Mr. Gamble filed an application to reopen his direct appeal pursuant to App. R. 26(B). The Hamilton County Court of Appeals' denial of Mr. Gamble's 26(B) application gives rise to this action.

STATEMENT OF FACTS

On April 3, 2009 in Hamilton County, Ohio, an incident occurred which resulted in Mr. Gamble and Mr. Lovett being arrested and indicted for the rape, kidnapping, and robbery of Tyson Crawford, as well as the felonious assault of Tyson Crawford by Mr. Gamble. Mr. Crawford testified that he met Mr. Lovett on a gay chat line; he met him in person on April 3. He also stated he had met Mr. Gamble about 2½ years ago and also saw him on April 3. According to Mr. Crawford, Mr. Lovett sent a text message to him about a "hookup," and picked him up. The 2 men drove to Mr. Lovett's residence and proceeded to the bedroom voluntarily. Eventually, Mr. Crawford voluntarily took off his clothing. He then stated that Mr. Gamble walked out of the closet with a gun and camcorder, stating he told Mr. Crawford he was going to "get you," apparently because Mr. Crawford stole Mr. Gamble's cell phone a few years before. Mr. Crawford then testified that Mr. Lovett hit him with a baseball bat; he then stated Mr. Gamble then gagged him with white socks and the 2 men raped him while taking pictures and recording the episode with the camcorder. He stated they did not use a condom. He stated they forced him to take a shower, but he did not wash himself, as he was trying to preserve evidence. He stated his cell phone and wallet were taken. He testified that he was blindfolded, put into the trunk of a car, and dropped off after a 10 minute drive. He stated he went to his mother's house, began to cry, and told his mother and brother he had been raped. His mother then put him in the bathtub where he cleaned up, despite the fact that he had just testified he did not clean up in the shower at Mr. Lovett's because he wanted to preserve evidence. Finally, he stated he was taken to the hospital where he spoke to a police officer. He then took the police officer to the location where he had

allegedly been raped. He admitted he lied to the investigation officer, Detective Smallwood, about a woman named Tasha being involved and continued to lie until his testimony that day. The video of the incident was then played, but Mr. Crawford claimed it did not show the entire episode.

On cross-examination, Mr. Crawford admitted he had a sexual relationship with Mr. Gamble 2½ years earlier; he admitted he was going to meet Mr. Lovett to have sex; and he admitted that during the alleged incident, he talked to Mr. Lovett and Mr. Gamble about having sex with another man named Keith. He also admitted he lied because he did not want his family or girlfriend to know about his sexual relations with men.

Det. Jeff Smallwood testified that he was the investigating officer of the alleged rape. He stated he spoke with Mr. Crawford who had minor injuries; he also obtained search warrants for Mr. Lovett's and Mr. Gamble's residences and Gamble's vehicle. He also took statements of the 2 men, as well as listened to the recorded jail house phone calls between Mr. Lovett, Mr. Gamble and Gamble's daughter. He admitted that Mr. Crawford had not been completely honest with him during the course of the investigation. He also testified that he never investigated Mr. Gamble's claims that Mr. Crawford had sex with men for money.

Mr. Gamble did not testify at trial, but his co-defendant, Mr. Lovett, did. He stated he had a sexual encounter with Mr. Crawford in 2005 and saw him again at a gay club in 2007; he also stated that he and Mr. Gamble did not rape, kidnap, or rob Mr. Crawford because the sex was consensual. He stated no gun was found at his residence by police, and he never seen Mr. Gamble with a gun. He also stated both he and Mr. Gamble wore condoms during the sex.

On October 29, the trial court found Mr. Gamble guilty of all counts and specifications in both cases.

On appeal Mr. Gamble's counsel raised seven assignments of error. In the first assignment of error counsel argued that Gamble's Due Process rights were violated because his indictment for felonious assault omitted a mens rea. Under the second assignment of error counsel argued that Mr. Gamble's 5th Amendment right against self-incrimination was violated by the trial court's comments regarding his failure to testify. Under both the third and fifth assignments of error appellate counsel argued that the evidence was insufficient as a matter of law to support his convictions. Appellate counsel also challenged the manifest weight of evidence under the fourth assignment of error. Under the sixth assignment counsel argued that the trial court abused its discretion by imposing a sentence that was above the maximum sentence for the most serious of Mr. Gamble's offenses, a 1st degree felony with a maximum of 10 years. Finally, under ground seven counsel argued that counts 1, 2, and 3 in case no. B-0902712-A and count 1 in case no. B-0905976 should have been merged for sentencing purposes as allied offenses of similar import. None of these claims proved fruitful as Mr. Gamble's convictions and sentence were upheld by the Court of Appeals.

On March 11, 2011, Mr. Gamble filed an application to reopen his direct appeal from the judgement of conviction and sentence, pursuant to Rule 26(B) of the Ohio Rules of Appellate Procedure, based on the claim of ineffective assistance of appellate counsel. State v. Murnahan, (1992), 63 Ohio St.3d 60. On September 20, 2011 the Court of appeals ruled that Mr. Gamble's proposed assignments of error would not have presented a reasonable probability of success had counsel advanced them on appeal and DENIED his 26(B) application. (Apx.pgs.1-3)

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW 1:¹

THERE WAS ERROR IN THE COURT OF APPEALS IN DENYING APPELLANT'S APPLICATION TO REOPEN PURSUANT TO APPELLATE RULE 26 (B), APPELLANT RAISED A GENUINE ISSUE AS TO WHETHER HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON APPEAL.

Pursuant to App. R. 26(B), a defendant in a criminal case may apply for reopening of the appeal from the judgement of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. State v. Murnahan, (1992) 63 Ohio St.3d 60. The term "ineffective assistance of counsel" is intended to comprise the two elements set forth in Strickland v. Washington, 466 U.S. 668 (1984), that is deficiency in the representation and prejudice resulting from such deficiency. In order to be successful on an application to reopen, the Appellant must prove that his counsel was deficient for failing to raise the issues he now presents, as well as showing that had counsel presented those claims on appeal, there was a "reasonable probability that he would have been successful." State v. Reed, 660 N.E.2d 456. In sum, the Appellant bears the burden of establishing that there is an issue as to whether there was a colorable claim of ineffective assistance of counsel on appeal. State v. Spivey, 701 N.E.2d 696.

1. Under this main proposition of law are several claims as to why appellate counsel's representation was deficient. Each of these claims will be addressed as "SUB CLAIMS."

SUB CLAIM ONE:

**APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSIGN AS
ERROR TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE**

In Mr. Gamble's application to reopen he maintains that appellate counsel was ineffective for failing to recognize several issues of ineffective assistance of trial counsel.

SUB-SUB CLAIM ONE(A):

Mr. Gamble first maintains that trial counsel was ineffective for failing to file a motion to suppress the state's use of evidence obtained in violation of his Fourth Amendment rights: against warrantless searches and seizures. U.S. Const. amend IV; Katz v. U.S., 389 U.S. 347, 357 (1967) (4th Amendment imposes presumptive warrant requirement for searches and seizures); Johnson v. U.S., 333 U.S. 10, 14-15 (1948) (4th Amendment requires warrant for search and seizure unless pre-existing exception applies.) During the investigation into the alleged rape and kidnapping Detective Jeff Smallwood was monitoring jailhouse phone conversations between Mr. Gamble and his daughter and also Gamble's daughter and Mr. Lovett. Det. Smallwood learned that Mr. Gamble's daughter had possession of a video tape of the alleged rape and some still photos. Det. Smallwood subsequently forced Gamble's daughter to turn over the evidence. In adjudicating this claim the Court of appeals simply stated that "These challenges depend for their resolution upon evidence outside the trial record. Therefore, the appropriate vehicle for advancing them is a postconviction petition." (Apx.pg.2) However, this conclusion is clearly erroneous. During the trial Det. Smallwood testified that he went without a warrant, court order, or subpoena to illegally obtain the photos and a video CD from Mr. Gamble's daughter. The trial court played the jail house calls where Mr. Gamble told his daughter to forward these

items to his attorney. The trial court even chastised Mr. Gamble's counsel for not objecting to the state's use of the evidence prior to trial through the proper channel a motion to suppress. Not waiting until trial begins and simply objecting to the state's use of the evidence.

All of this was made a part of the trial record and transcribed. The Court of Appeals was incorrect in holding otherwise. Mr. Gamble's Fourth Amendment rights were clearly violated. And clearly the introduction of this evidence, at trial, had a prejudicial effect. The credibility of the alleged victim in this case was shattered by his own self-contradicting statements. Had appellate counsel recognized the deficiencies of trial counsel there is at least a "reasonable probability" that the appeal would have been successful.

SUB-SUB CLAIM ONE(B);

In his second sub-sub claim Mr. Gamble maintains trial counsel was ineffective for failing to object to the state's witness Det. Smallwood's presence in the courtroom during the alleged victim's testimony prior to his own. It is a well established principle that witnesses who hear other's testimony, prior to their own, are highly likely to alter their own in order to assure uniformity in testimony. Mr. Gamble's trial counsel sat by idle as state's witness, Det. Smallwood studied alleged victim Crawford's testimony and then comported his own thereto. Mr. Gamble's 5th and 14th Amendment Due Process rights, as well as his 6th Amendment right to counsel, was violated to his substantial prejudice. Appellate counsel's failure to recognize this error further compounded the violation. In response to Mr. Gamble's claim, the Court of Appeals again avoided adjudicating this claim by employing the premise that this claim also depends on evidence outside the trial record. (Apx.Pg.2) However this conclusion is contrary to the facts and reversal is warranted.

SUB-SUB CLAIM ONE(C):

Lastly, Mr. Gamble maintains that trial counsel failed to properly prepare for trial. Trial counsel first came aboard on or about July 6, 2009. Trial took place on September 21, 2009. This gave counsel approximately two months to prepare for trial. Although Mr. Gamble's trial counsel was fully aware of the alleged victim's varying accounts of the incident, or in fact complete false statements, he failed to secure the victim's prior statements to law enforcement officers or his grand jury testimony to dwell into the extent of those untruths. The state's own witness, Det. Smallwood, testified that the alleged victim, Mr. Crawford, continually lied about the alleged kidnapping and rape. Although under the performance prong of Strickland, there is a "strong presumption" that counsel's strategy and tactics fall "within the wide range of reasonable professional assistance," Strickland, supra at 690, this presumption is inapplicable when there has been an "actual or constructive denial of the assistance of counsel altogether." Id. at 692. This presumption has been upheld in cases where trial counsel has failed adequately to prepare for trial. see Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (counsel's failure to conduct any pretrial discovery and failure to file timely suppression motion was prejudicial because unreasonable and below prevailing professional norms); Groseclose v. Bell, 130 F.3d 1161, 1170 (6th Cir.1990) (counsel's failure to interview witnesses, conduct any legal research or obtain and review any records was ineffective assistance)

Additionally, trial counsel failed to obtain any medical or DNA experts in order to challenge the state's evidence as to whether Mr. Crawford had been raped, whether his DNA was recovered in Gamble's trunk, or whether Gamble was in fact HIV positive and whether Crawford contracted the disease. see e.g., Pavel v. Hollins, 261 F.3d 217-18 (2nd Cir.2001) (counsel's failure to call

important fact witness and medical expert at trial was ineffective assistance because testimony of those witnesses would have rebutted prosecution's already weak case)

Even if it could be said that none of these instances of ineffective assistance of trial counsel warrant relief, cumulatively they worked to Mr. Gamble's actual prejudice and deprived him of due process and a fair trial.

SUB CLAIM TWO;

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSIGN AS ERROR SEVERAL INSTANCES OF PROSECUTORIAL MISCONDUCT

SUB-SUB CLAIM TWO(A): "IMPROPER VOUCHING"

Although the line between proper and improper advocacy is not always clear, courts have consistently found certain types of prosecutorial conduct improper. One type of action which is classified as misconduct is where the prosecutor in a criminal case vouches for the credibility of government witnesses. see e.g., U.S. v. Manning, 23 F.3d 570, 572-73 (1st Cir.1994) (prosecutor's statement that government witnesses could not lie on stand because "bound by the truth" was improper); U.S. v. Francis, 170 F.3d 546, 550-51 (6th Cir.1999) (prosecutor's statement that government witnesses were credible because untruthful testimony would jeopardize plea agreements was improper)

Courts generally use a two prong test for evaluating a defendant's prosecutorial misconduct claim: first, was the prosecutor's conduct actually improper; second, did the misconduct, taken in context of the trial as a whole, violate the defendant's due process rights. U.S. v. Carter, 236 F.3d 777, 783 (6th Cir.2001) In addition to this two prong test, courts have reversed cases where the misconduct does not violate a defendant's due process rights however reversal was intended solely to deter future

misconduct. see U.S. v. Hasting, 461 U.S. 499, 506-07 (1983)

In Mr. Gamble's case the prosecutor made statement such as "Mr. Crawford (the alleged victim) here is the person that is the most credible," Crawford doesn't lie a bat was used," "Mr. Crawford came up here and bared his soul on the stand." Clearly, these statements were improper and the first part of the two prong test is satisfied. Additionally, this is a case where the alleged victims credibility was "case determining." Mr. Crawford destroyed his own credibility by lying to police and making several self contradicting statements throughout the pre-trial and trial stages. The prosecution's attempt to rebuild that credibility by placing the prestige of the government behind him by providing personal assurance of his veracity rendered the proceedings fundamentally unfair violating Mr. Gamble's 5th and 14th Amendment Due Process rights.

SUB-SUB CLAIM TWO(B): "KNOWING USE OF FALSE TESTIMONY"

It is a well established matter of law: a prosecutor may not knowingly present false testimony and has a duty to correct that which he knows to be false. see Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Holohan, 294 U.S. 103, 112 (1935)(per curium)

In Mr. Gamble's case, during its opening statement the prosecution argued that "he'll (Mr. Crawford) describe to you he was beaten with a gun and beaten with a bat," "he will tell you the defendant's stole his cell phone. Both defendants stole his cell phone and his wallet," "He was then ordered to go into a trunk," "The fact that Mr. Crawford gets into the trunk at... by force, blindfolded and tied, his hands were tied." However, according to Mr. Crawford's testimony.

Q. When you got into the trunk were you still blindfolded?

A. Yes

Q. And was anything else on your body tied?

A. No

In addition, Det. Smallwood testified that he never found any evidence that Mr. Crawford was in the trunk nor did the state introduce any evidence that Crawford's wallet was stolen or he was beaten with a gun.

Mr. Crawford did testify that as Mr. Gamble allegedly came out of the closet he stated "Didn't I tell you that I was going to get you?" However, the prosecution had in its possession a medical report wherein he told medical staff that Mr. Gamble stated "yeah you are the one who stole my phone." Mr. Crawford first maintained that he was forced to undress and have sex. But later admitted that he came with the intention of having sex and undressed willingly. He is seen on the video appearing to enjoy the encounter and at one point stated that he claimed it was rape due to the photos and video and that he did all this to protect himself and family or keep them from learning of his hidden sexual preference.

The record in this case clearly establishes that the prosecution did use testimony which it knew to be false and failed to correct that testimony.

In adjudicating this claim the Court of Appeals held that appellate counsel was not ineffective for failing to raise the issue because "it was not material because there was no reasonable likelihood that it could have effected the judgement of the jury." Although in Mr. Gamble's case, the judge was the trier of fact, this in no way lessens the impact. The prosecution's entire case rested on the testimony of the alleged victim, which the prosecution knew to be false. Therefore, it was unreasonable for the Court of Appeals to conclude that the credibility of the alleged victim was not material when that was the only evidence leveled against Mr. Gamble.

Moreover, a conviction resting entirely, (or otherwise,) on evidence

which the prosecution knew to be false violates the defendant's due process rights under the 5th and 14th Amendments to the US. Constitution and Mr. Gamble's convictions cannot stand.

SUB CLAIM THREE:

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSIGN AS ERROR THE PROSECUTION'S USE OF EVIDENCE OBTAINED IN VIOLATION OF APPELLANT'S FOURTH AMENDMENT RIGHT AGAINST WARRANTLESS SEARCH AND SEIZURE.

Much argument supporting this proposition has already been stated in SUB CLAIM ONE(A) and is fully adopted here. Additionally, Appellant submits that appellate counsel could have raised the error despite trial counsel's failure because it constituted "plain error." US. v. Olano, 507 U.S. 725 (1993)

SUB CLAIM FOUR:

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSIGN AS ERROR THE FACT THAT APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." U.S. Const. amend. VI. This right extends to state prosecutions through the Due process Clause of the 14th Amendment. see Pointer v. Texas, 380 U.S. 400, 403 (1965) By guaranteeing this right, and others, the Confrontation Clause serves to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing" in an adversarial proceeding. Md. v. Craig, 497 U.S. 836, 845 (1990)

In the instant case, the trial court allowed a medical report to be admitted into evidence despite the fact that the emergency room nurse who wrote it did not testify. This evidence falls under the core class of testimonial statements covered by the Confrontation Clause. Crawford v. Washington, 541 U.S. 36 (2004) This evidence was used by the prosecution to

bolster its case against Mr. Gamble and the error of admitting it was not harmless beyond a reasonable doubt. Coy v. Iowa, 487 U.S. 1012, 1022 (1988); U.S. v. Olsterbroke, 891 F.2d 1216 (6th Cir.1989) Therefore appellate counsel was ineffective for failing to raise the claim.

One way of establishing ineffective assistance of appellate counsel is demonstrating that counsel raised weaker issues on appeal while allowing stronger issues to fall to the wayside. In Mr. Gamble's case counsel dedicated two assignments of error to her sufficiency challenge. First, counsel raised a claim that the evidence was insufficient as a matter of law to convict Gamble. In another assignment counsel argued that the trial court erred in overruling Gamble's Rule 29 motion for acquittal. Both arguments challenge the sufficiency of evidence and are exactly the same. This illustration demonstrate that counsel was not acting as that guaranteed by the Sixth Amendment and reversal is warranted.

C O N C L U S I O N

WHEREFORE, Mr. Gamble requests that this Honorable Supreme Court of Ohio accepts/allows this matter to be herd on the merits.

Respectfully submitted,

Johnny Gamble 618-728
Johnny Gamble #618-728
Ross Correctional Institution
P.O. Box 7010
Chillicothe, Ohio 45601

Appellant, pro se

C E R T I F I C A T E O F S E R V I C E

I hereby certify that a copy of the foregoing jurisdictional memorandum was sent, via ordinary US. Mail, to counsel of record for Appellee, Hamilton County prosecutor's Office, 1000 Main St., Cincinnati, Ohio 45202 on this 18 day of October, 2011.

Johnny Gamble 618-728
Johnny Gamble

Appellant, pro se

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090876
	:	TRIAL NOS. B-0902712
Plaintiff-Appellee,	:	B-0905976
vs.	:	
JOHNNY GAMBLE,	:	<i>ENTRY DENYING</i>
	:	<i>APPLICATION TO REOPEN</i>
Defendant-Appellant.	:	<i>APPEAL.</i>

We consider this cause upon defendant-appellant Johnny Gamble's App.R. 26(B) application to reopen this appeal and upon the state's opposing memorandum. An application to reopen an appeal must be granted if the applicant establishes "a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696; App.R. 26(B)(5). The United States Supreme Court's decision in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, provides the standard for determining whether the applicant was denied the effective assistance of appellate counsel. See *State v. Reed*, 74 Ohio St.3d 534, 535, 1996-Ohio-21, 660 N.E.2d 456. The applicant must prove "that his counsel [performed deficiently in] failing to raise the issues he now presents and that there was a reasonable probability of success had [counsel] presented those claims on appeal." *State v. Sheppard*, 91 Ohio St.3d 329, 330, 2001-Ohio-52, 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).

In his application, Gamble contends that his appellate counsel was ineffective in failing to present assignments of error challenging a police detective's seizure of photographs and a CD and his trial counsel's ineffectiveness in failing to move to

suppress the items, to request the victim's grand-jury testimony, to discover the victim's statements to the detective, to secure independent experts to examine the state's evidence, or to secure the testimony of allegedly "favor[able]" witnesses. These challenges depend for their resolution upon evidence outside the trial record. Therefore, the appropriate vehicle for advancing them is a postconviction petition. See *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. Accordingly, we cannot say that appellate counsel performed deficiently in failing to assign these matters as error on direct appeal.

Appellate counsel was not ineffective in failing to assign as error trial counsel's ineffectiveness in failing to object to the presence of the victim and the state's representative in the courtroom despite an order for the separation of witnesses. Neither witness was subject to exclusion under the separation order. See Evid.R. 615(B)(2) and (B)(4). And the record does not demonstrate a reasonable probability that, but for trial counsel's failure to timely object to their presence, the results of Gamble's trial would have been different. See *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *Bradley*, 42 Ohio St.3d 136, paragraph three of the syllabus.

Nor was appellate counsel ineffective in failing to present an assignment of error asserting that Gamble's convictions had been the product of false testimony knowingly elicited by the prosecution. Even if the testimony had been false and the state had known or should have known that it was false, it was not "material" because there was no reasonable likelihood that it could have affected the judgment of the jury. See *State v. Iacona*, 93 Ohio St.3d 83, 97, 2001-Ohio-1292, 752 N.E.2d 937.

Finally, appellate counsel was not ineffective in failing to present an assignment of error challenging, under the Confrontation Clause of the Sixth Amendment of the United States Constitution, the trial court's admission of a medical report into evidence without the testimony of the medical personnel who had made and signed the report. The Confrontation Clause was not implicated by the admission of statements by the victim memorialized in the report, because the

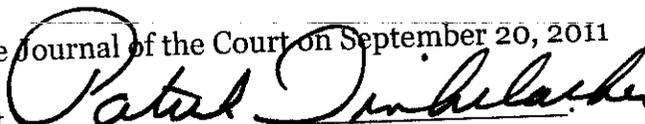
victim testified at trial and was thus available for cross-examination. See *Crawford v. Washington* (2004), 541 U.S. 36, 59, 124 S.Ct. 1354, fn. 9. The observations and assessments of medical personnel recorded in the report for the purpose of diagnosing and treating the victim were not barred under the Confrontation Clause because they were not testimonial. See *Melendez-Diaz v. Massachusetts* (2009), 557 U.S. ___, ___, 129 S.Ct. 2527, fn. 2; *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶26; accord *State v. Daniels*, 1st Dist. No. C-090566, 2010-Ohio-5258, ¶13. The observations and assessments recorded for forensic purposes were testimonial and thus inadmissible without the declarants' testimony. See *Arnold*, 126 Ohio St.3d at ¶25. But defense counsel waived all but plain error when he "stipulate[d]" to the report, and the trial court's error in admitting the report's testimonial statements did not constitute plain error when the error cannot be said to have been outcome-determinative. See Crim.R. 52(B); *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus; see, also, *State v. Nix*, 1st Dist. No. C-030696, 2004-Ohio-5502 (holding that a *Crawford* error is subject to plain-error analysis).

Because the proposed assignments of error would not have presented a reasonable probability of success had counsel advanced them on appeal, Gamble has failed to demonstrate a genuine issue as to whether he has a colorable claim of ineffective assistance of counsel on appeal. See *Spivey*, 84 Ohio St.3d at 25; *Reed*, 74 Ohio St.3d at 535-536. Accordingly, the court denies his application to reopen his appeal.

To the Clerk:

Enter upon the Journal of the Court on September 20, 2011

per order of the Court


Presiding Judge

(COPIES SENT TO ALL PARTIES.)