[Cite as *State v. Wright*, 2002-Ohio-1548.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	**CASE NO. 97 CO 35**
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	**OPINION**
	)	**AND**
JOSEPH A. WRIGHT,	)	**JOURNAL ENTRY**
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Columbiana County Common Pleas Court, Case No. 96 CR 64.

JUDGMENT: Application for Reopening Denied.

APPEARANCES:

For Plaintiff-Appellee:
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For Defendant-Appellant:
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JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: March 21, 2002

PER CURIAM:

{¶1} On November 30, 2001, Appellant Joseph A. Wright (hereinafter "Wright") filed an Application for Reopening pursuant to App.R. 26(B) attempting to reopen this matter subsequent to our decision affirming his conviction. *State v. Wright* (September 27, 2001) Columbiana App. No. 97-CO-35, unreported. For the following reasons Wright's request is denied.

{¶2} The applicable appellate rule in this case is App.R. 26 titled "Application for reconsideration; application for reopening," which provides in relevant part:

{¶3} "(B) Application for reopening.

{¶4} A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

{¶5} "(2) An application for reopening shall contain all of the following:

{¶6} " * * *

{¶7} "(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment, [;]

{¶8} **"(c) One 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;**

{¶9} **" * * * **

{¶10} **"(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal."**

{¶11} **When considering an application for reopening pursuant to App.R. 26(B), we must first determine, based upon defendant's application, affidavits, and portions of the record before us, whether the defendant has set forth a colorable claim of ineffective assistance of appellate counsel. See *e.g. State v. Milburn* (Aug. 24, 1993), Franklin App. No. 89AP-655, unreported (1993 Opinions 3553); *State v. Burge* (1993), 88 Ohio App.3d 91, 623 N.E.2d 146. To establish a claim of ineffective assistance of counsel under *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052 ,80 L.Ed.2d 674, a defendant must show that counsel's performance was so deficient that it was unreasonable under prevailing professional norms. *Id.* at 687-688. See, also, *State v. Seiber* (1990), 56 Ohio St.3d 4, 11. A defendant must also show that "but for" counsel's deficient performance the results of the proceedings would have been different. *Strickland*, at 694. The two-prong test set forth in *Strickland* is applicable to claims of ineffective assistance of appellate counsel. *State v. Rojas* (1992), 64 Ohio St.3d 131, 141; *State v. Watson* (1991), 61 Ohio St.3d 1, 16.**

{¶12} **The *Strickland* standard requires the following proof:**

{¶13} "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687-88; see *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus.

{¶14} Wright argues appellate counsel was ineffective for failing to raise three purported assignments of error. Appellate counsel is not necessarily ineffective for failing to raise a particular claim of error. Appellate counsel has no constitutional duty to raise every conceivable assignment of error on appeal. *Jones v. Barnes* (1983), 463 U.S. 745; see *State v. Campbell* (1994), 69 Ohio St.3d 38, 53. In fact, "[a] brief that raises every colorable issue runs the risk of burying good arguments * * * in a verbal mound made up of strong and weak contentions." *Jones*, 463 U.S. at 753. "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy * * * " *Jones*, 463 U.S. at 754; see *State v. Rojas* (1992), 64 Ohio St.3d 131, 141-42; *State v. Watson* (1991), 61 Ohio St.3d 1, 15-16.

{¶15} Consequently, absent an egregious omission, the mere failure to present a specific assignment of error in addition to others raised on appeal will not constitute deficient performance of appellate counsel. The burden of showing deficient performance is a heavy one as counsel in Ohio are presumed competent, *Vaughn*

v. Maxwell (1965), 2 Ohio St.2d 299, 301; *State v. Smith* (1981), 3 Ohio App.3d 115, 120, and judicial scrutiny of the performance of counsel is to be highly deferential. *Strickland,* 104 S.Ct. at 2065-66; *State v. Williams* (1992), 80 Ohio App.3d 648, 661.

{¶16} Even when an applicant demonstrates the deficient performance of appellate counsel for failing to present an additional assignment of error, the applicant still must establish prejudice. See, *e.g.*, *Sharp v. Puckett* (C.A.5, 1991), 930 F.2d 450. The applicant must show that there is a reasonable probability that, but for the unprofessional error, the result of the appeal would have been different. *Id.* at 452-53; *State v. Dehler* (June 6, 1994), Cuyahoga App. Nos. 65006, 66020, unreported, reopening disallowed (Aug. 24, 1994), Motion No. 53391, slip entry at 4.

{¶17} Wright claims appellate counsel was ineffective for failing to raise three assignments of error, the first of which alleges:

> {¶18} "Counsel was ineffective as to impeach the witness of their testimony when it was plainly seen that the prosecution was leading the witness in their testimony." [*sic*]

{¶19} This issue was raised by appellate counsel in Wright's original appeal, albeit in another context. Appellate counsel's sole assignment of error claimed Wright was prejudiced in that he could not effectively impeach witnesses without the aid of an expert witness.

{¶20} If appellate counsel were to challenge trial counsel's effectiveness with regard to cross-examination of the witnesses, it would have served to undermine every argument Wright made with respect to his request for expert assistance. Specifically, if

Wright now argues it was in fact possible for trial counsel to effectively impeach the testimony of the state's witnesses, there would be no need for the expenditure of funds for expert assistance. It appears appellate counsel made a strategic decision not to raise that assignment of error as it would be contrary to Wright's request for expert assistance. This claim is meritless.

{¶21} Wright next asserts appellate counsel was ineffective for failing to raise the following error:

{¶22} "MANIFEST WEIGHT OF EVIDENCE. It is clear that there is no physical evidence in this case; just of witnesses that was (*sic*) coached in their testimony."

{¶23} Wright argues, although in Ohio there is no requirement statutory or otherwise, that the testimony of a rape victim be corroborated as a condition precedent to a conviction, referring to *State v. Gingell* (1982), 7 Ohio App.3d 364 and *State v. Love* (1988), 49 Ohio App.3d 88, 550 N.E.2d 951. Wright's reliance is misplaced. In *Love*, the defendant similarly argued the verdict was against the manifest weight of the evidence because the victim's testimony was uncorroborated. The court responded, "In *State v. Gingell* (1982), 7 Ohio App.3d 364, 7 OBR 464, 455 N.E.2d 1066, we found no requirement, statutory or otherwise, that a rape victim's testimony be corroborated as a condition precedent to conviction." *Id.* at 91.

{¶24} Moreover, appellate counsel raised this argument in the same context as Wright's first proposed assignment of error. Both trial counsel and appellate counsel maintained that the lack of corroborating evidence mandated both a new trial and the expenditure of funds for an expert to testify at that trial. Once again, we find that appellate counsel made a strategic decision

not to separately raise this assignment of error as it would be cumulative of the error which was in fact assigned. Furthermore, this claim is groundless. As we explained in our original decision, there were four competent witnesses which testified as to the requisite elements of the crimes involved.

{¶25} As his final proposed assignment of error, Wright claims his appellate counsel should have raised the following error:

> {¶26} "PREJUDICIAL AGAINST BY JUDGE (*sic*) WHILE GIVING JURY INSTRUCTIONS. The misconduct of the judge while instructing the jury was evident through prejudicial and biased remarks, by instructing the jury to find the defendant guilty. The jury was not permitted to rule on the evidences, but were given plain verbal instructions to find the defendant guilty. On T.P. 105, line 4 and 5 of the jury instructions, I quote the judge: 'Now as to Count Five (5), the defendant is before you find the defendant guilty.'"

{¶27} We must first address Wright's creative use of punctuation. When placed in context, the trial court actually instructed the jury, "Now as to count five, the defendant is – before you find the defendant guilty, you would have to find beyond a reasonable doubt * * * " This line is buried amidst sixteen lines of jury instructions in which the court clearly instructed the jury "the defendant is presumed innocent until and unless his guilt has been established beyond a reasonable doubt."

{¶28} A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, paragraph four of the syllabus; *State v. Baker* (1993), 92 Ohio App.3d 516, 536, 636 N.E.2d 363. A reviewing court must consider the whole charge as given rather than separate portions of a charge. *State v. Baker, supra*.

{¶29} Initially, we reject Wright's assertion that this instruction was incorrect even when read in isolation. Moreover, the instructions as a whole are essentially identical to the definition set forth in R.C. 2901.05(D), and approved by the Ohio Supreme Court in *State v. Frazier* (1995), 73 Ohio St.3d 323, 330, 652 N.E.2d 1000.

{¶30} We further note that trial counsel failed to object to the alleged prejudicial jury instruction. Therefore, Wright's proposed assignment of error would be reviewed under the plain error standard as found in Crim.R. 52. That is, the failure to object to an instruction waives "any claim of error * * * unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus. Further, "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, syllabus. We do not deem these circumstances to be exceptional and find that appellate counsel was not deficient in failing to raise the alleged error. This assigned error is meritless.

{¶31} For the foregoing reasons, Wright's application for reopening is denied.

Vukovich, P.J., concurs.
Waite, J., concurs.
DeGenaro, J. concurs.