[Cite as *State v. Rosa*, 2020-Ohio-3964.]

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT**
**COUNTY OF CUYAHOGA**

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 108051

v. :

EDITO ROSA, :

Defendant-Appellant. :

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JOURNAL ENTRY AND OPINION

**JUDGMENT:** APPLICATION DENIED
**RELEASED AND JOURNALIZED:** August 4, 2020

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Cuyahoga County Court of Common Pleas
Case No. CR-17-615294-A
Application for Reopening
Motion No. 537999

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Tasha L. Forchione, Assistant Prosecuting Attorney, *for appellee*.

Edito Rosa, *pro se*.

KATHLEEN ANN KEOUGH, J.:

**{¶ 1}** On February 24, 2020, the applicant, Edito Rosa, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Rosa*, 8th Dist. Cuyahoga No. 108051, 2019-Ohio-4888. In that case, this court affirmed his convictions for

one count of vaginal rape, with notice of prior conviction and a repeat violent offender specification; three counts of kidnapping, with notice of prior conviction and repeat violent offender and sexual motivation specifications; three counts of gross sexual imposition; and one count each of robbery, aggravating menacing, theft, disrupting public services, criminal damaging or endangering, and telecommunications harassment. This court also vacated Rosa's six-year sentence for Count 5, gross sexual imposition, because the sentence was erroneous for a fourth-degree felony. This court also vacated the sentence for kidnapping under Count 2, because the trial court had merged Count 1, rape, with Count 2. This court further noted that the trial court had not journalized its finding of guilty for the notice of prior convictions and repeat violent offender specifications under certain counts. Thus, this court remanded to the trial court for correction of these errors.

**{¶ 2}** Rosa now argues that his appellate counsel was ineffective for not arguing the following: (1) trial counsel was ineffective for failing to object to leading questions during the victim's testimony, (2) the trial court committed plain error in admitting impermissible evidence regarding Rosa's character during the victim's son's testimony, (3) trial counsel was ineffective for failing to object during the son's testimony concerning Rosa's prior bad acts, and (4) trial counsel failed to object during the sexual assault nurse examiner's testimony. The state filed its brief in

opposition on May 14, 2020.[1] Rosa filed a reply brief on June 16, 2020. For the following reasons, this court denies the application.

## FACTUAL AND PROCEDURAL BACKGROUND

**{¶ 3}** Rosa and the victim began dating in January 2017. However, by February 2017, the victim told Rosa she did not want to date him anymore. Nevertheless, she agreed to go to his house on March 6, 2017. When she did not show, Rosa called and texted her until midnight, and left aggressive messages. At midnight, Rosa sent her video messages and photographs of her and Rosa hugging and kissing and told her that he would post these pictures on Facebook. She perceived this as a threat. At this point, the victim called Rosa, who told her that if she did not come to his house, he would kill her and her teenage son. The victim told her son about the threatening messages and then went to Rosa's house.

**{¶ 4}** When she arrived at the house, Rosa was naked, and beer and cocaine were on a table. The victim again told him she did not want to date him anymore, and he replied that she was not going anywhere. When she attempted to leave, Rosa slapped her in the face and pushed her against the television. The victim told Rosa she had to get her anxiety medicine, and Rosa told her he would drive her to her home. When they got outside, the victim tried to run away. Rosa tackled her, pulled her by her hair, held her down, choked her, hit her head against her car, and smashed her cell phone. Rosa told her that if she did not go back into the house, he

[1] The court struck Rosa's application twice for failing to comply with Loc.App.R. 13.2. The state filed its brief in opposition after Rosa filed the complying brief.

would knock her out and drag her back into the house. The victim decided to become compliant in the hope that if she did what he said, he would let her go.

**{¶ 5}** After Rosa had forced her into the house, he pulled her into the bathroom, took off her muddy clothes, and forced her to take a shower, during which he touched her breasts, vagina, and buttocks. They then went to bed. The victim told Rosa whatever she thought she needed to say in order to leave the house, including that she would move in with him later that day.

**{¶ 6}** At 6:00 a.m., the victim's alarm went off, and she began gathering her clothes. Rosa became agitated and told her "no, no, you know what you have to do before you go." (Tr. 351.) The victim knew that meant she would have to have sex with him. Thus, she laid on the bed and let him do what he wanted to do in order for her to be able to leave. While Rosa was raping her, she kept telling him that her stomach hurt. Afterward, Rosa allowed her to go to work.

**{¶ 7}** Instead, the victim went directly to her home where she told her son what had happened and used his cell phone to call 911. EMS came, treated her, and took her to the hospital where a rape kit was collected and pictures taken of her injuries. She also talked to a sexual assault nurse examiner (SANE). During the following days, Rosa tried to contact the victim through voicemails and text messages, in which he apologized for what occurred and blamed his actions on drugs and alcohol.

**{¶ 8}** The grand jury indicted Rosa for the above-listed counts, as well as additional counts of robbery and aggravated menacing. The jury found him guilty

on all counts, except one count of robbery and one count of aggravating menacing. The trial judge found him guilty of the notices of prior convictions, and repeat violent offender specifications. The trial court merged Counts 1 and 2, as well as Counts 5 and 6, gross sexual imposition and kidnapping, and imposed a total sentence of eight years.

**{¶ 9}** Rosa's appellate counsel argued the following assignments of error: (1) There was insufficient evidence to support the convictions for Count 1, rape, and Count 2, kidnapping; (2) The trial court erred in admitting into evidence the narrative given to the Emergency Medical Service technicians; (3) The trial court erred in admitting a detective's testimony that Rosa declined to make a statement to the police; and (4) The six-year prison sentence for the fourth-degree felony of gross sexual imposition was improper. The state conceded this last argument, and this court vacated the sentence and remanded for correction.

## DISCUSSION OF LAW

**{¶ 10}** Rosa now argues that his appeal should be reopened pursuant to App.R. 26(B) because his appellate counsel was ineffective for not arguing certain assignments of error. An application for reopening must be granted "if there is a genuine issue as to whether a defendant has received ineffective assistance of appellate counsel on appeal." App.R. 26(B)(5). The Supreme Court of Ohio has held that the two-pronged analysis in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the appropriate standard when assessing whether

an applicant has raised a "genuine issue" to reopen an appeal per App.R. 26(B). *State v. Myers*, 102 Ohio St.33d 318, 2004-Ohio-3075, 810 N.E.2d 436.

**{¶ 11}** Pursuant to *Strickland*, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); and *State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456 (1996).

**{¶ 12}** In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction, and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* at 689.

**{¶ 13}** Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752,

103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 672 N.E.2d 638 (1996).

**{¶ 14}** Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

**{¶ 15}** In his first proposed assignment of error, Rosa submits that his appellate counsel should have argued that his trial counsel was ineffective for failing to object to the prosecutor's leading questions.

**{¶ 16}** During trial, the following exchange occurred between the prosecutor and the victim:

> Q: I want to be a little more specific. Before you told us you had sex with him, can you tell us what type of sexual activity occurred?
>
> A: He just had — we just had regular sex, him on top of me. That's it.

Q: Vaginal sex?

A: Yes, vaginal sex.

Rosa complains that these were improper leading questions that were unnecessary and trial counsel should have objected to them.

**{¶ 17}** Evid.R. 611(C) provides in pertinent part as follows: "Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness' testimony." In *State v. Johnson*, 8th Dist. Cuyahoga No. 82340, 2003-Ohio-6634, this court ruled that it is wholly within the trial judge's discretion to permit the state to ask leading questions of its own witness. The exception concerning the need to develop testimony is quite broad. This court notes that the rape indictment specified vaginal rape. Thus, the subject questions were necessary to develop the testimony to establish the elements of the crime. Furthermore, the failure to object to leading questions in direct examination almost never rises to the level of ineffective assistance of counsel. *State v. Wilson*, 8th Dist. Cuyahoga No. 107806, 2019-Ohio-4056. Following the admonition of the Supreme Court, this court will not second-guess appellate counsel's professional judgment in declining to argue this point.

**{¶ 18}** Rosa's second and third arguments concern the testimony of the victim's teenage son. He testified that Rosa came over one time uninvited and banged on the house. His mother went out to meet him, and Rosa looked unhappy. He also testified that on the night of the incident, he could hear his mother arguing and yelling with Rosa on the telephone, that she seemed frightened and helpless,

and that she left for Rosa's home. He further testified that when she came back the next morning, she was crying and having a hard time speaking. When she was able to speak, she told him that Rosa had beaten and raped her all night.

**{¶ 19}** Rosa complains that this testimony, especially of him banging on the door and the phone call with the yelling, constitutes inadmissible bad acts testimony. He further complains that his trial counsel was ineffective for failing to object to such testimony.

**{¶ 20}** These arguments are not well-taken. Under Evid.R. 404(B), such evidence may be admissible to show motive, opportunity, intent, preparation, plan or knowledge. Such evidence also shows the tumultuous and strained relationship between the individuals shortly before the rape. Such evidence can show motive and intent and is admissible. *State v. Nields*, 93 Ohio St.3d 6, 2001-Ohio-1291, 752 N.E.2d 859; *State v. Wilson*, 74 Ohio St.3d 381, 659 N.E.2d 292 (1996); *State v. Thompson*, 8th Dist. Cuyahoga No. 81322, 2003-Ohio-3939; and *State v. Lucas*, 8th Dist. Cuyahoga No. 108436, 2020-Ohio-1602.

**{¶ 21}** The court notes that trial counsel objected five times during the son's short testimony. Moreover, because the evidence was admissible and presented for a legitimate purpose, Rosa cannot show prejudice under *Strickland*. Thus, the failure to object more often was not ineffective assistance of trial counsel.

**{¶ 22}** Rosa's final argument is that trial counsel failed to object to the SANE nurse's testimony. The nurse testified from the form she filled out, which read that Edito Rosa vaginally raped the victim. This court has ruled that such testimony, if

error, is harmless because it is merely cumulative to the admissible evidence. *State v. Smith*, 8th Dist. Cuyahoga No. 90476, 2008-Ohio-5985. Thus, appellate counsel in the exercise of professional judgment properly declined to argue this argument.

**{¶ 23}** Accordingly, this court denies the application.

KATHLEEN ANN KEOUGH, JUDGE

PATRICIA ANN BLACKMON, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR