

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-0372

STATE OF OHIO,

Plaintiff--Appellee,

-v-

ELDAR VELIEV,

Defendant--Appellant.

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case No. 09AP-1059  
09AP-1060

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ELDAR VELIEV

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SUPREME COURT OF OHIO

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**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Claims of ineffective assistance of counsel may be left undiscovered due to the inadequacy of appellate counsel or the inability of the defendant to identify such errors within the time allotted. State v. Murnahan, (1992), 63 Ohio St.3d 60, 65. In response to this concern, this Court formulated Ohio R. App.P. 26(B). Under that rule, the proper procedural vehicle for adjudicating claims of ineffective assistance of appellate counsel is to file an application, in the court of appeals, to reopen the direct appeal. In this case, trial counsel also served as appellate counsel. On direct appeal, appellant's counsel did not raise all issues that they objected to at trial. Nor did appellant's counsel raise any issues concerning whether or not they rendered effective assistance when functioning as trial counsel. The trial devolved into a character assassination of the defendant on the one hand with the exaltation of the moral superiority of the prosecution's witnesses on the other hand. Review of the record indicates trial counsel was negligent in getting available evidence before the jury to rebut the prosecution's case. The Court should accept jurisdiction.

**STATEMENT OF THE CASE AND FACTS**

On May 17, 2009, Eldar Veliev attended a small gathering at the Hawa Russian restaurant in Columbus, Ohio with Garri Ambartsoumov, and mutual friends. During the course of the meal, Veliev and Ambartsoumov went outside to smoke a cigarette. Shortly thereafter, a fight ensued outside the restaurant leaving multiple parties, including Ambartsoumov and his father-in-law, with knife wounds.

The origin and nature of the fight was hotly contested. According to the prosecution version of facts, once outside Ambartsoumov approached Tigran Safaryan. Ambartsoumov and Safaryan

began arguing and Ambartsoumov purportedly pulled a knife. Safaryan blocked Ambartsoumov's slash with his right arm, resulting in a large cut. Arut Koulian began to approach the two men when Veliev stepped in front of Koulian. Veliev reportedly made a shoving motion at Koulian. When Veliev retreated, Koulian noticed blood pouring out of his neck and onto his clothes. He suffered from a cut across his throat. Dmitri Semikin observed that Safaryan and Koulian were injured and rushed to assist them. Another witness, Alexander Dashovsky saw the injuries and called 911. Both men attempted to help Safaryan and Koulian until police and medical personnel arrived. The Columbus Police Department arrived as Ambartsoumov was leaving the building and he was later arrested. Semikin and Dashovsky left immediately and did not speak to the police. Veliev was not arrested the night of the altercation.

The defense described a different set of events. Veliev and Ambartsoumov were enjoying a night out with family and friends. Once they were outside, Safaryan and Koulian approached them in a threatening manner. Ambartsoumov told Safaryan that he did not wish to argue because he was with his family. Safaryan did not like this answer and attacked Veliev and Ambartsoumov along with Koulian and a number of other unknown individuals. They only escaped when Ambartsoumov's father-in-law saw the fight and pushed their attackers enough so that Veliev and Ambartsoumov were able to reenter the restaurant. Ambartsoumov and his father-in-law both suffered knife wounds, but they did not know who cut them. Remarkably, there was no evidence of either Safaryan's or Koulian's blood on Veliev or Ambartsoumov. Nor were any weapons found.

Veliev was charged with Felonious Assault and Attempted Murder. Following a jury trial, he was convicted of both counts. The trial court sentenced Appellant to 8 years in prison. Following a timely appeal, the Franklin County Court of Appeals affirmed Appellant's conviction and sentence

on December 23, 2010. Thereafter, Ambartsoumov filed a notice of appeal and a memorandum in support of jurisdiction in the Ohio Supreme Court. The Court declined to accept jurisdiction. *State v. Veliev*, Case No. 2011-0197, 128 Ohio St.3d 1461, 2011-Ohio-1829.

On March 17, 2011, Veliev filed an application to reopen his direct appeal in *State v. Veliev*, 10<sup>th</sup> Dist. Nos. 09AP-1059 and 09AP-1060, 2010-Ohio-6348. The Tenth District Court of Appeals denied the application to reopen and issued a journal entry on January 24, 2012. This case is before the Court as Veliev is presently seeking leave to appeal the denial of application to reopen.

### ARGUMENT

**Proposition of Law No. 1: Appellate counsel renders ineffective assistance when they neglect to present issues which have a reasonable probability of success on appeal where a “reasonable probability” is defined as a probability sufficient to undermine one’s confidence in the outcome.**

The Due Process Clause of the Fourteenth Amendment to the United States Constitution grants criminal defendants the right to the effective assistance of counsel during a first appeal of right. Appellate counsel is charged with acting as an advocate and must support the cause of his client to the best of his ability. *Penson v. Ohio*, 488 U.S. 75 (1989). While counsel is not required to assert every non-frivolous issue on appeal, when the ignored issue(s) are clearly stronger than those presented, the presumption of effective assistance of counsel will be overcome. *Gray v. Greer*, 800 F.2d 644, 646 (CA7 1986). Prejudice is established when the neglected claim would have a reasonable probability of success on appeal. *Boliek v. Bowersox*, 96 F.3d 1070 (CA8 1996). Failure to present a meritorious issue for review constitutes ineffective assistance of appellate counsel. *Matire v. Wainwright*, 811 F.2d 1430 (CA11 1987). To establish ineffective assistance of appellate counsel, Appellant does not have to show by a preponderance of evidence that the result of his appeal would have been different but for appellate counsels’ errors, but only a reasonable probability

that the errors undermine confidence in the outcome. See, Strickland v. Washington, (1984), 466 U.S. 668, 694; Brown v. Myers, (CA9 1998), 137 F.3d 1154, 1157. The failure of Appellant's counsel to present the following meritorious issues to the court of appeals undermines one's confidence in the outcome:

Under Appellant's proposed "Assignment of Error No.1", he posited Defense Counsel rendered ineffective assistance when they failed to object to the admission of evidence concerning victim Tigran Safaryan's character during the prosecution's case-in-chief where the defendant had not yet put on his case or otherwise put on any evidence concerning the victim's character in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Ohio Constitution. Under Evid.R. 404(A)(2), the character of the victim is seldom relevant evidence in a criminal prosecution. The prosecution may not present background on the victim's character unless the defense opens the door. *State v. Richardson*, 103 Ohio App.3d 21, 26 (Hamilton 1995). In this case, despite the fact that the defense did not open the door, the prosecution elicited favorable character evidence concerning Safaryan.

In proposed Assignment of Error 2, the trial court erred when it allowed victim Safaryan to testify over objection why he was "cautious" of Appellant in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Ohio Constitution. On direct examination the prosecution questioned Safaryan, over repeated objection, as to why he was allegedly "cautious" of Ambartsoumov. (TR. Vol.1, pp. 71-74). In *State v. Apanovitch* (1987), 33 Ohio St.3d 19, the court discussed the admissibility of evidence reflecting a victim's fearful state of mind. *Apanovitch* limits this type of testimony to

reflecting the state of mind of the victim, but not the reasons underlying that state of mind. *Id.*, at 21-22. See also *State v. Awkal*, (1996), 76 Ohio St.3d 324, 331, 1996-Ohio-395.

In proposed Assignment of Error 3, the trial court erred when it permitted Safaryan's cousin, Sabina Shvets, to testify over defense objection as to the reasons why Safaryan was cautious of Ambartsoumov in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Ohio Constitution. The prosecution called Shvets in their case-in-chief to testify as to the reason why Safaryan was cautious of Ambartsoumov. Over objection, Shvets testified as to purported threats made by Ambartsoumov to Safaryan. In *State v. Apanovitch* (1987), 33 Ohio St.3d 19, the court discussed the admissibility of evidence reflecting a victim's fearful state of mind. *Apanovitch* limits this type of testimony to reflecting the state of mind of the victim, but not the reasons underlying that state of mind. *Id.*, at 21-22. See also *State v. Awkal*, (1996), 1996-Ohio-395, 76 Ohio St.3d 324, 331.

In proposed Assignment of Error 4, the trial court erred to the prejudice of the defendants when it used the wrong standard in deciding the discoverability of materials sought by the defense under Crim R. 16(B)(1)(f) in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Ohio Constitution. In deciding whether materials subpoenaed by the defense were discoverable, the trial court employed a *Brady v. Maryland*, 373 U.S. 83, (1963) due process test to decide that the materials were not discoverable. (TR. Vol 1, p. 100-101). Under Crim.R. 16(B)(1)(f), the standard for disclosure is not whether the information sought meets *Brady* standards and is exculpatory. Instead, the standard to be used by the trial court is whether the information sought is favorable and material either to guilt or punishment. The *Brady* standard is a standard of appellate review and

should not be employed by the trial court as a standard of pretrial review under Crim.R. 16. See, *United States v. Conder*, 423 F.2d 904, 911 (6th Cir. 1970); *United States v. Sudikoff*, 36 F.Supp.2d 1196 (C.D. Cal. 1999).

In proposed Assignment of Error 5, Defense Counsel rendered ineffective assistance when they failed to object to the admission of evidence of the victim Arut Koulian's character during the prosecution's case in chief where the defendant had not yet put on his case or otherwise any evidence concerning the victim's character in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Ohio Constitution. Under Evid.R. 404(A)(2), the character of the victim is seldom relevant evidence in a criminal prosecution. The prosecution may not present background on the victim's character unless the defense opens the door. *State v. Richardson*, 103 Ohio App.3d 21, 26 (Hamilton 1995). In this case, despite the fact that the defense did not open the door, the prosecution elicited favorable character evidence concerning Koulian.

In proposed Assignment of Error 6, Defense counsel rendered ineffective assistance when they failed to cross-examine Tigran Safaryan about inconsistent statements he made to medical personnel concerning how the confrontation started that resulted in his wound in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Ohio Constitution. In discovery, the defense obtained the medical records of Safaryan indicating: "He was at a restaurant and apparently there was a male who he was familiar with not friends with, who was yelling at some girls in the restaurant. The patient confronted him about his behavior and this other male then pulled a knife on him and his friend. . . ." At trial, Safaryan testified but made no mention of the confrontation being about a

male yelling at some girls in the restaurant. Over 5 days after Safaryan testified, defense counsel sought to admit Safaryan's medical records containing the inconsistent account of the confrontation. The trial court refused to allow the admission of the medical records. (TR. Vol 4, p. 18). Defense counsel failed to cross-examine Safaryan about the medical records when they had the opportunity because they thought the records were going to be admitted by the prosecution. (TR. Vol 4, p. 20). Defense counsels' reliance on their belief that the prosecution would admit Safaryan's medical records constituted deficient performance. Ambartsoumov was prejudiced because defense counsels' lack of diligence meant that the jury did not hear Safaryan's prior inconsistent statement that the assault occurred when he confronted a male about yelling at some girls in the restaurant.

In proposed Assignment of Error 7, the trial court erred when it overruled the defense motion for a continuance to subpoena Tigran Safaryan in order to question him about statement he made to emergency room personnel in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Ohio Constitution. Here, the defense sought a continuance to subpoena Safaryan concerning a prior inconsistent statement he made regarding the genesis of the confrontation. The testimony sought was relevant to a key issue in the case. The evidence was not already before the jury. And the request was not frivolous. Appellant was denied his right to put on a defense when that trial court overruled the motion for a continuance to obtain the testimony of Safaryan.

In proposed Assignment of Error 8, the trial court erred in refusing to allow the defense to play a video tape recording of Ambartsoumov's statement to the police in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Ohio Constitution. The prosecution put on evidence suggesting that

Defendant Ambartsoumov was less than forthcoming concerning the origin of his injury and how the incident occurred. To counter the prosecution's position that Ambartsoumov's motive for being less than forth-coming with police concerning the origin of his cut was because it was self inflicted, the defense sought to put on the video taped interview of Ambartsoumov conducted by Detective Siniff indicating that he voluntarily told police about the origin of his injury. The trial court refused to permit the videotape to be played for the jury on the grounds that Defendant had not met the requirements of R.C. 2945.59, Evid.R. 801(D)(1)(b) and deprived the state of right to cross-examine the defendant. Neither the Ohio Constitution or the federal constitution confer any rights to the state of Ohio or its authorized representatives to confront or cross-examine witnesses who testify against the state. The state has no constitutional to cross examine anyone. The trial court's refusal to permit the playing of the video tape denied Ambartsoumov his right to present a defense to the prosecution's claim that he was less than forthcoming concerning the origin of his injury and how the incident occurred.

In proposed Assignment of Error 9, trial counsel rendered ineffective assistance when they failed to introduce during cross-examination of Detective Siniff portions of his interview with Ambartsoumov in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Ohio Constitution. At trial police officers testified that Ambartsoumov never provided an explanation as to how he cut his hand. During direct examination in the prosecution's case-in-chief Detective Siniff testified that he had interviewed Ambartsoumov. At no time did defense counsel question Detective Siniff concerning the Ambartsoumov interview. Defense counsel were not diligent when they failed to introduce Ambartsoumov's interview during the examination of Detective Siniff. If defense counsel had

questioned Siniff about the Ambartsoumov interview the jury would have discovered, contrary to the position of the prosecution, that Ambartsoumov did answer all of Siniff's questions concerning how he cut his finger and all details of the incident. Introduction of Ambartsoumov's statement to Siniff during the prosecution's case in chief would have undermined the prosecution's position that Ambartsoumov had something to hide and was deceptive during questioning by police.

In proposed Assignment of Error 10, trial counsel rendered ineffective assistance when they failed to introduce, pursuant to Evid.R. 801(D)(1)(b), Ambartsoumov's statement to the Detective Siniff indicating how he was cut the night of the incident in order to rebut the prosecution's charge against Ambartsoumov that he never explained to the police how he got cut during the incident in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Ohio Constitution. Under Evid.R. 801(D)(1)(b), a prior statement by a witness is not hearsay if the declarant testifies at trial and is subject to cross examination and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. In this case, the prosecution questioned Officers Ewing and Graber concerning the alleged failure of Ambartsoumov to tell police how he got cut and how the incident occurred. Ambartsoumov testified that he told Detective Siniff how he got cut and how the incident occurred. Ambartsoumov was subject to cross examination. Introduction of the interview of Ambartoumov by Siniff would have proved that Ambarsoumov previously told Siniff how he got cut and how the incident occurred and would have rebutted the prosecution's insinuations that he was less than forthcoming with police. Under such circumstances the interview would be admissible under Evid. R. 801(D)(1)(b). Trial counsels' failure to introduce Ambartsoumov's prior consistent statement that

would have undermined the credibility of the prosecution's case prejudiced the defendant.

### CONCLUSION

In light of the Proposition of Law presented herein Appellant requests that the Court accept jurisdiction and review this case on the merits.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

A copy of the foregoing was served upon:

Ron O'Brien  
Franklin County Prosecuting Attorney  
373 South High Street – 13<sup>th</sup> Flr.  
Columbus, Ohio 43215

by regular United States Mail, postage prepaid, this <sup>5<sup>th</sup></sup> day of March, 2012.



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Keith A. Yeazel



**CONTENTS OF APPENDIX TO APPELLANT'S BRIEF**

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IN THE COURT OF APPEALS OF OHIO

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OHIO

TENTH APPELLATE DISTRICT

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CLERK OF COURTS

State of Ohio,	:	
	:	No. 09AP-1059
Plaintiff-Appellee,	:	(C.P.C. No. 09CR-03-1753)
v.	:	No. 09AP-1060
	:	(C.P.C. No. 08CR-07-5040)
Eldar Z. Veliev,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

MEMORANDUM DECISION

Rendered on January 24, 2012

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

*Keith A. Yeazel*, for appellant.

ON APPLICATION FOR REOPENING

BROWN, P.J.

{¶1} Defendant-appellant, Eldar Z. Veliev, has filed an application to reopen his direct appeals in *State v. Veliev*, 10th Dist. Nos. 09AP-1059 and 09AP-1060, 2010-Ohio-6348, WL 5449848, appeals not allowed, 128 Ohio St.3d 1461, 2011-Ohio-1829. On July 11, 2008, appellant and a co-defendant, Garri Ambartsoumov, were each indicted on one count of felonious assault arising out of an incident on May 17, 2008, in which Tigran Safaryan and Arut Koulian sustained knife wound injuries outside a Columbus restaurant. On March 24, 2009, appellant and Ambartsoumov were also indicted on one count each

of attempted murder. A jury subsequently found appellant guilty of felonious assault and attempted murder, while Ambartsoumov was found guilty of felonious assault. Following a sentencing hearing, the trial court merged appellant's sentences, imposing a sentence of eight years incarceration on the conviction for attempted murder.

{¶2} Appellant appealed his conviction through the same counsel who represented him at trial. In *Veliev*, this court overruled all of appellant's seven assignments of error and affirmed his conviction.

{¶3} Pursuant to App.R. 26(B)(1), "[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." In order for this court to grant an application for reopening, an applicant must demonstrate that "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). In deciding whether an applicant has raised a genuine issue of ineffective assistance, Ohio courts employ the two-pronged analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Woodard*, 96 Ohio St.3d 344, 2002-Ohio-4767, 774 N.E.2d 1213, ¶ 4.

{¶4} Both appellant and his co-defendant, Ambartsoumov, have filed applications to reopen their appeals pursuant to App.R. 26. In *State v. Ambartsoumov*, 10th Dist. No. 09AP-1054, 2010-Ohio-6293, WL 538439, appeal not allowed, 128 Ohio St.3d 1461, 2001-Ohio-1829, this court addressed ten proposed assignments of error raised by appellant's co-defendant. Upon review of the issues raised in those assignments of error, this court found that Ambartsoumov failed to raise a genuine issue

as to whether he was deprived of the effective assistance of counsel on appeal before the court of appeals.

{¶5} In the instant application, appellant's ten proposed assignments of error are identical to those raised in the application for reopening filed by Ambartsoumov. For the reasons set forth in our decision in *Ambartsoumov*, the appellant's application in the instant case similarly fails to raise a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal. Accordingly, appellant's application to reopen his direct appeals is hereby denied. Further, appellant's request for an evidentiary hearing is also denied.

*Application for reopening denied;  
request for evidentiary hearing denied.*

BRYANT and DORRIAN, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
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OHIO  
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CLERK OF COURTS

State of Ohio,	:	
	:	No. 09AP-1059
Plaintiff-Appellee,	:	(C P C No 09CR-03-1753)
v.	:	
	:	No. 09AP-1060
	:	(C P C. No 08CR-07-5040)
Eldar Z. Veliev,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on January 24, 2012, it is the order of this court that appellant's March 17, 2011 application for reopening is denied, and appellant's request for an evidentiary hearing is also denied.

BROWN, P.J., BRYANT & DORRIAN, JJ.



\_\_\_\_\_  
Judge Susan Brown, P.J.

*J. Prichard*

IN THE COURT OF APPEALS OF OHIO

STATE OF OHIO  
FRANKLIN COUNTY

TENTH APPELLATE DISTRICT

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State of Ohio, :  
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Plaintiff-Appellee, :  
 :  
v. :  
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Garri Ambartsoumov, :  
 :  
Defendant-Appellant. :

CLERK OF COURTS

No. 09AP-1054

(C.P.C. No. 08CR-07-5039)

(REGULAR CALENDAR)

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MEMORANDUM DECISION

Rendered on December 6, 2011

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

*Keith A. Yeazel*, for appellant.

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ON APPLICATION FOR REOPENING

BROWN, J.

{1} On March 17, 2011, defendant-appellant, Garri Ambartsoumov, filed an application to reopen his direct appeal in *State v. Ambartsoumov*, 10th Dist. No. 09AP-1054, 2010-Ohio-6293. On July 11, 2008, appellant and a co-defendant, Eldar Veliev, were each indicted on one count of felonious assault arising out of an incident on May 17, 2008, in which two individuals, Tigran Safaryan and Arut Koulian, sustained knife wound injuries outside a Columbus restaurant. On March 24, 2009, appellant and Veliev were also indicted on one count each of attempted murder. A jury subsequently found

appellant guilty of felonious assault, while Veliev was found guilty of felonious assault and attempted murder. On October 22, 2009, the trial court sentenced appellant to eight years incarceration on his conviction for felonious assault. Appellant appealed his conviction through the same counsel who represented him at trial. In *Ambartsoumov*, this court affirmed appellant's conviction.

{¶2} Pursuant to App.R. 26(B)(1), "[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 appellant seeking to reopen his appeal "bears the burden of establishing that there was 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.

{¶3} Under Ohio law, "[t]he two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess whether [an applicant] has raised a 'genuine issue' as to the ineffectiveness of appellate counsel in his request to reopen under App.R. 26(B)(5)." *State v. Woodard*, 96 Ohio St.3d 344, 2002-Ohio-4767, ¶4. In order to demonstrate ineffective assistance, an applicant "must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal." *Id.*, quoting *State v. Sheppard* (2001), 91 Ohio St.3d 329, 330. Under *Strickland*, the court shall grant "a heavy measure of deference to counsel's judgments." *Strickland v. Washington* (1984), 466 U.S. 668, 691, 104 S.Ct. 2052, 2066. Further, there exists a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, 466 U.S.

at 689, 104 S.Ct. at 2065. Additionally, counsel has much discretion in formulating the strategy of defense and "need not raise every possible issue in order to render constitutionally effective assistance." *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶7, citing *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308.

{¶4} In seeking to reopen his appeal, appellant raises ten proposed assignments of error he contends should have been raised on direct appeal. Appellant's first and fifth proposed assignments of error assert that appellate counsel was ineffective in failing to argue that trial counsel should have objected to the introduction of character evidence elicited by the prosecution regarding the two victims, Safaryan and Koulian. Appellant argues that the prosecution elicited character information about Safaryan, including evidence with respect to (1) where he was born, (2) his reasons for immigrating to the United States, (3) his family background, and (4) his business background. Appellant argues that defense counsel rendered ineffective assistance in similarly failing to object to the admission of character evidence of Koulian.

{¶5} Appellant raised a similar challenge in his direct appeal, asserting under his first assignment of error that the state went to great lengths to portray Safaryan as an upstanding businessman. This court previously held that "the record does not reflect that the state questioned Safaryan extensively during direct examination about his business interests." *Ambartsoumov* at ¶45. With respect to Koulian, the record indicates that the prosecution briefly questioned this witness about where he was originally from (Russia), when he came to the United States, and how he located to the Columbus area. We do not find that defense counsel's failure to object to this line of questioning at trial fell below an objective standard of reasonableness. Upon review of the proposed assignments of

error, we conclude that the evidence presented by the prosecution regarding the victims served as background information to frame the events in question, and appellant cannot demonstrate either deficient performance or prejudice as a result of the admission of such evidence.

{¶6} Appellant's second and third proposed assignments of error allege that the trial court erred in allowing Safaryan to testify, over objection, as to why he was cautious of appellant, and in permitting Safaryan's cousin, Sabina Shvets, to testify over objection with regard to reasons Safaryan was cautious of appellant.

{¶7} In response, the state argues that the evidence was proper under Evid.R. 404(B) as providing background information about the strained relationship between appellant and Safaryan, and to show motive. We agree that Safaryan's testimony stating that he was "cautious" of appellant is evidence of the discord between them and the nature of their relationship, and was also admissible proof of motive. "Motive" is defined as "something, such as a willful desire, which leads one to act in a certain fashion," *State v. Lallathin*, 7th Dist. No. 299, 2003-Ohio-3478, ¶43. See also *State v. Wilson*, 74 Ohio St.3d 381, 390, 1996-Ohio-103 (fact that defendant had previously argued with victim and threatened to hit her arguably supports claimed motive for kidnapping and such evidence was admissible under Evid.R. 404(B)); *State v. Drake* (1999), 135 Ohio App.3d 507, 511 (prior threats by defendant were relevant to the facts of this case and trial court was within its discretion to admit them under Evid.R. 404(B)). The testimony of Shvets was similarly proper, and we therefore find that these proposed assignments of error fail to demonstrate a viable claim of ineffective assistance of appellate counsel.

{¶8} Under his fourth proposed assignment of error, appellant asserts that the trial court erred in using the wrong standard in determining whether materials subpoenaed by the defense were discoverable. Similar arguments regarding the evidentiary standard employed by the trial court were addressed and rejected in the direct appeal. Further, this court reviewed the sealed record and determined that "there is nothing contained in that report which would have altered the jury verdicts, nor do we find error with the trial court's determination that the report did not contain material required to be disclosed under *Brady [v. Maryland (1963), 373 U.S. 83, 83 S.Ct. 1194]*." *Ambartsoumov* at ¶55. Accordingly, appellant cannot demonstrate prejudice as a result of appellate counsel's failure to raise this issue.

{¶9} Appellant's proposed sixth assignment of error alleges that trial counsel was ineffective in failing to cross-examine Safaryan with respect to purported inconsistent statements he made to medical personnel concerning how the confrontation began. More specifically, attached as "Exhibit B" as an appendix to appellant's application for re-opening is an "emergency department note," stating in part that the patient was in a restaurant, and "apparently there was a male who he was familiar with not friends with, who was yelling at some girls in the restaurant. The patient confronted him about his behavior and the other male then pulled a knife on him and his friend."

{¶10} The record indicates the trial court was concerned about prejudice to appellant in the event that the statement ("the other male [i.e., appellant] then pulled a knife on him") was admitted. Upon review, there is no showing that the statements made by Safaryan were inconsistent, or that the failure to admit these statements resulted in prejudice. Additionally, the trial court had discretion to bar admission of the statements as

hearsay. In this respect, the court noted on the record: "I don't think that they are proper under [Evid.R.] 803(4) as statements for the purpose of medical diagnosis or treatment. The rest of it sounds like it's straightforward medical records." (Tr. Vol. IV, at 18.) Upon review, appellant's sixth proposed assignment of error fails to raise a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal.

{¶11} In his proposed seventh assignment of error, appellant contends the trial court erred in denying defense counsel's motion for a continuance to subpoena Safaryan in order to question him about statements he made to emergency room personnel. This assignment of error, however, depends upon the validity and admissibility of the above statements. Accordingly, there was no reasonable probability of success if appellate counsel had raised this issue on appeal.

{¶12} Appellant's eighth, ninth, and tenth proposed assignments of error all relate to the trial court's rulings with respect to defense counsel's attempt to introduce statements made by appellant during a tape recorded interview with Detective Glenn Siniff. Under his eighth proposed assignment of error, appellant alleges that appellate counsel was ineffective in not arguing that the trial court erred in failing to admit the taped interview between Detective Siniff and appellant. Under his ninth proposed assignment of error, appellant argues that appellate counsel should have raised a claim of ineffective assistance of trial counsel because defense counsel failed to introduce, during the cross-examination of Detective Siniff, portions of his interview with appellant. Under his tenth proposed assignment of error, appellant argues that appellate counsel should have raised a claim of ineffective assistance of trial counsel based upon trial counsel's failure to introduce appellant's statement to Detective Siniff indicating how he was cut on the night

of the incident. Appellant argues that introduction of his interview with the detective would have rebutted evidence by the state that appellant never offered an explanation to the police as to how he received a cut.

{¶13} At trial, the court ruled that the interview tape constituted hearsay evidence "when offered by the defendant. It's, obviously, not an admission by a party-opponent as it would be if it was offered by the state." (Tr. Vol. IV, at 56.) The court ruled that it was not appropriate to play the video as a prior consistent statement because appellant had not laid a proper foundation. The court further ruled that Evid.R. 801(D)(1)(b) was not a basis to play the tape to rebut some claim of recent fabrication of evidence by appellant. Finally, the court ruled that playing the tape would deprive the state of its right to cross-examine the appellant "if its played as a way to circumvent live testimony by the defendant." (Tr. Vol. IV, at 57.)

{¶14} As noted by the trial court, the statement at issue constituted hearsay unless appellant could show one of the hearsay exceptions applied. Here, the trial court properly concluded that the statement did not fall within the prior consistent statement exception to the hearsay rule. Pursuant to Civ.R. 801(D)(1)(b), a witness's prior consistent statement can be used "to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive." In the instant case, however, appellant sought to introduce the statement before the witness making the statement had taken the stand. Because "it is essential that the consistent statement be admitted to *rebut* a charge of improper motive \* \* \* the prior-consistent-statement exception simply cannot apply." (Emphasis sic.) *United States v. Smith* (C.A.6, 1984), 746 F.2d 1183, 1185, citing *United States v. Strand* (C.A.9, 1978), 574 F.2d 993, 996, fn.

4; *United States v. Weil* (C.A.4, 1977), 561 F.2d 1109, 1111. Further, as noted by the state, while appellant argues that the interview containing his "prior consistent statement" was admissible as non-hearsay, the prosecution did not suggest that appellant testified differently in his interview with the detective; rather, appellant could not explain how he was cut.

{¶15} The state further argues that appellant cannot show that the outcome of the trial would have been different had the interview been played. We agree. The record indicates that appellant was questioned, during direct examination, about his interview with Detective Siniff. Appellant testified that he answered every question by the detective, including how he cut his hand. Upon review, appellant has failed to show that appellate counsel's refusal to raise the arguments under the eighth, ninth, and tenth proposed assignments of error created a genuine issue as to whether appellant was deprived of the effective assistance of counsel on appeal.

{¶16} Based upon the foregoing, because appellant fails to raise a genuine issue of ineffective assistance of appellate counsel, his application for reopening is hereby denied.

*Application for reopening denied.*

BRYANT, P.J., and DORRIAN, J., concur.

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