

IN THE COURT OF APPEALS OF OHIO
FIFTH APPELLATE DISTRICT
RICHLAND COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 22CA83
	:	
v.	:	
	:	
John H. Mack, Jr.,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	

BEFORE: Jason P. Smith; William B. Hoffman; Michael D. Hess, Judges

APPEARANCES:

April F. Campbell, Campbell Law, LLC, Dublin, Ohio, for appellant.

Jodie M. Schumacher, Richland County Prosecuting Attorney, and Philip D. Bogdanoff, Special Assistant Prosecutor, Mansfield Ohio, for Appellee.

Smith, J.

{¶1} This appeal is pending before this Court pursuant to our February 3, 2026 decision that granted the application of John H. Mack, Jr., defendant below and appellant herein, to reopen his appeal pursuant to App.R. 26(B). Appellant raises the following assignment of error.¹

¹ Appellant filed a pro se merit brief on March 13, 2026, prior to the appointment of appellate counsel. On April 21, 2026, the State filed a request for an extension to file its brief and in the alternative a motion to strike appellant's pro se brief, along with a request that the Court appoint counsel for appellant in accordance with App.R. 26(B)(6). It appears that the State's Motion to Strike went unaddressed. However, appellant was eventually appointed counsel, who filed another brief on behalf of appellant. Appellants have the right to either appear pro se or to have counsel

ASSIGNMENT OF ERROR

- I. THE TRIAL COURT REVERSIBLY ERRED IN NOT COMPLYING WITH SIERAH'S LAW AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR NOT RAISING THIS ARGUMENT ON DIRECT APPEAL.

FACTS

{¶2} We adopt and incorporate the procedural and factual history of this case as set forth in this Court's initial decision affirming appellant's underlying convictions, as follows:

On May 12, 2021, a 17-count indictment was filed charging appellant with the following offenses:

Count One: Aggravated Murder, an unclassified felony in violation of R.C. 2903.01(A) and 2929.02(A), with a R.C. 2929.04(A)(7) Felony Murder Specification;

Count Two: Aggravated Murder, an unclassified felony in violation of R.C. 2903.01(B) and 2929.02(A);

Count Three: Murder, an unclassified felony in violation of R.C. 2903.02(A) and (D), and 2929.02(B);

Count Four: Murder, an unclassified felony in violation of R.C. 2903.02(B) and (D), and 2929.02(B);

Count Five: Kidnapping, a first-degree felony in violation of R.C. 2905.01(A)(2) and (C)(1);

represent them, but they have no right to act as co-counsel on their own behalf. *See State v. Phillips*, 2022-Ohio-478, fn. 2 (4th Dist.), citing *State v. Thompson*, 33 Ohio St.3d 1 (1987). *See also State v. Larr*, 2023-Ohio-2128, ¶ 25 (5th Dist.) (defendants have no right to a hybrid form of representation). Therefore, we hereby strike appellant's pro se brief and only consider the assignment of error raised by appointed counsel in the reopened appeal.

- Count Six: Kidnapping, a first-degree felony in violation of R.C. 2905.01(B)(1) and (C)(1);
- Count Seven: Tampering With Evidence, a third-degree felony in violation of R.C. 2921.12(A)(1) and (B);
- Count Eight: Tampering With Evidence, a third-degree felony in violation of R.C. 2921.12(A)(1) and (B);
- Count Nine: Tampering With Evidence, a third-degree felony in violation of R.C. 2921.12(A)(1) and (B);
- Count Ten: Tampering With Evidence, a third-degree felony in violation of R.C. 2921.12(A)(1) and (B);
- Count Eleven: Tampering With Evidence, a third-degree felony in violation of R.C. 2921.12(A)(1) and (B);
- Count Twelve: Tampering With Evidence, a third-degree felony in violation of R.C. 2921.12(A)(1) and (B);
- Count Thirteen: Abduction, a third-degree felony in violation of R.C. 2905.02(A)(2) and (C);
- Count Fourteen: Grand Theft of a Motor Vehicle, a fourth-degree felony in violation of 2913.02(A)(1) and (B)(5);
- Count Fifteen: Gross Abuse of a Corpse, a fifth-degree felony in violation of R.C. 2927.01(B) and (C);

Count Sixteen: Domestic Violence, a first-degree misdemeanor in violation of R.C. 2919.25(A) and (D)(2); and

Count Seventeen: Obstructing Official Business, a second-degree misdemeanor in violation of R.C. 2921.31(A) and (B).

The charges stemmed from the death of Melinda K. Davis, appellant's ex-girlfriend, who was found deceased in the trunk of her car on March 14, 2021.

A review of the record reveals that Davis, (hereinafter “victim”), had informed several family members and a friend that she intended to go to appellant's residence on the morning of February 25, 2021, in order to pick up a firearm that had been owned by a family member and was of sentimental value to her. Appellant and the victim had formerly resided in the house together, but the victim had moved out when the couple broke up. Appellant dropped her son off at school and then headed to appellant's residence shortly before 9:00 a.m. Prior to going there she texted her friend, Paula Littlefield, her plans and told her that if she hadn't called her within a few hours, something might be wrong. Littlefield was alarmed by the statement and requested appellant's address, which the victim provided. The evening prior, the victim had made plans with her niece, Jessica Lewis. The two were supposed to meet for breakfast around 11:00 a.m. on February 25th, but the victim did not show up. Lewis tried to call the victim but the calls went directly to voicemail. At that point, Lewis contacted the victim's other cousin, C.J. Higginbotham. The victim had informed Higginbotham the day prior of her plans to go to appellant's residence to retrieve the gun. Upon hearing from Lewis, Higginbotham drove to the Shelby Police Department and reported the victim as missing.

Around the same time, at approximately 12:30 p.m., the Shelby Police Department received a call regarding a juvenile who had fled school on foot. That juvenile turned out to be the victim's son, Darius Clark. The record indicates that the victim

and her son had a disagreement the evening prior regarding sharing their location with each other on their phones. It was decided that each would share their location. Clark received a text from the victim shortly after she dropped him off at school the morning of the 25th asking him to call her. He began trying to call her, but her phone went to voicemail. At some point thereafter, the victim's location was turned off on her phone, causing Clark to be concerned and leading him to literally run from the school to look for his mother.

It appears that based upon the information received from Higginbotham and Clark, the Shelby Police Department requested that the Richland County Sheriff's Office go to appellant's residence to check on the victim and speak to appellant. Detectives Justin Ady and Giovanni Masi arrived at appellant's residence at approximately 1:17 p.m. to find Paula Littlefield and Jessica Lewis already there. The detectives knocked on the front door, but no one answered.

When law enforcement arrived at the residence, they also observed from the road two fires burning in appellant's backyard. Appellant's backyard was unfenced and visible from the road, driveway, and the neighbor's yard. Law enforcement was able to observe that the smoke was coming from a firepit and a grill with the lid closed. There was snow on the ground and the record indicates that officers also observed several sets of footprints leading from the garage into the backyard.

When they received no answer at the front door, officers entered the backyard and knocked on the back door. While knocking on doors and attempting to get someone to answer, Detective Ady believed he heard a sound coming from inside the house, but he could not be sure. At this point, both Littlefield and Lewis were visibly upset and crying and began to provide additional information regarding appellant and the victim's past relationship, which included violence on appellant's part. The women also related the information regarding the victim's text to Littlefield, as well as the victim's failure to show up for lunch with Lewis. The decision was made to call for additional units to assist.

Additional units reported and in addition to Detectives Ady and Masi, Deputy Bert Skeen, Deputy Christian Reed, and Deputy Owen Ross arrived on scene. In updating the others when they arrived, Deputy Ady paraphrased the victim's text to Littlefield as stating that if Littlefield had not heard from her in two hours, she should call the police. Deputy Ross was familiar with the location as he had been dispatched there the day prior regarding a call from appellant's niece, Whitney Mack, who had reported a problem with the alarm system. While Deputy Skeen was assisting, he was also training Deputy Reed, who was new. Deputy Skeen entered the backyard and inspected the firepit to rule out the presence of blood, weapons, or body parts, as he was concerned about destruction of evidence. All he found in the firepit was a burning cushion. He also opened the lid to the grill but found only papers burning. While he was in the backyard, appellant's neighbor informed him that appellant had been there earlier that morning and that burning trash was not appellant's normal practice.

While Ross and Reed were in the backyard, appellant's ex-wife, Robyn Mack, arrived after having been contacted by law enforcement. She had a key to the house in order for her children, who she shared with appellant, to get into the house. It appears that information being gathered by the various deputies was being relayed either by phone or radio to Captain Zehner. Once Robyn Mack arrived, the decision to enter the residence was made and she let Deputy Ross and Captain Zehner in with her key. The officers cleared the residence and did not locate the victim. However, Robyn Mack picked up appellant's cell phone when it started ringing while it was sitting in appellant's bedroom in plain view. The caller was appellant's niece, Whitney Mack, who arrived at the residence shortly thereafter. Robyn Mack took appellant's phone with her outside and began going through the phone, commenting to law enforcement that appellant had a security system which was accessible through an app on his phone.

While all of this was going on, several other things were occurring simultaneously. The Shelby Police Department and

Richland County Sheriff's Office were working together, sharing information, issuing a BOLO (be on the lookout) for the victim's vehicle, and they were also attempting to "ping" the victim's phone. When Whitney Mack arrived at the residence she informed the officers that she had been at the library because appellant had asked her to be out of the house between 8:00 a.m. and 5:00 p.m. that day because he had scheduled repairs to be done to the washer as well as the Wi-Fi in the house. Whitney had returned to the house when Robyn Mack informed her of the situation. At that point, Whitney let Deputy Ross back into the house for the second time. While in the house she informed him that a runner that was usually present in the entryway was missing, information which Ross relayed to Captain Zehner.

From that point forward, the victim and her vehicle remained missing, and law enforcement was unable to locate appellant. The investigation continued, initially with the Shelby Police Department obtaining a search warrant to search the security system app on appellant's phone. Suspicious behavior was observed through the app, including video footage of appellant the morning of February 25, 2021, dragging things around inside his house, going back and forth behind a curtain, and then walking up to one of the wall mounted cameras and turning it around so that he would be out of view. Thereafter, the Richland County Sheriff's Office obtained a search warrant to search the contents of appellant's phone as well as his house.

While in the house pursuant to the search warrant, officers observed several boxes that appeared to be from Amazon that may have been connected to appellant's work as a truck driver for J.B. Hunt. After speaking with J.B. Hunt, another warrant was obtained in relation to the boxes, which led to a separate receiving stolen property charge being filed. Law enforcement was thereafter called back to the residence several days later at the request of Whitney Mack, who reported that someone had been in the house. She detailed that parts of the floor had been ripped up, walls had been partially painted in the hallway, clothes with paint on them had been left, and items had been moved. Importantly, samples taken from some of the boxes during the execution of the search warrants ultimately revealed the presence

of the victim's blood. At that point, the investigation changed from a missing persons investigation to a kidnapping investigation.

Then, on March 4, 2021, appellant turned himself in. He was held in jail on the pending kidnapping and receiving stolen property charges. All the while, the search for the victim continued, with law enforcement discovering that appellant had rented a vehicle the day the victim initially went missing. Finally, on March 14, 2021, a J.B. Hunt employee found the victim's car parked in the parking lot of an apartment complex located near the business. The vehicle was filled with trash and it required great effort for law enforcement to be able to access the trunk of the vehicle, where the victim's body was found. Her body was found nude, covered in a blanket, with her hair shorn, her feet bound, and covered in what appeared to be pink glitter. Later autopsy results showed that the victim died as a result of blunt force trauma, that she was strangled, and had suffered a broken neck. Surveillance footage obtained from the surrounding area showed appellant walking from the apartment complex to the vehicle rental location on February 25, 2021.

As a result, in addition to being charged with receiving stolen property in Richland County Court of Common Pleas case number 21CR0203, appellant was further indicted on the above 17 charges in case number 21CR221 on May 12, 2012. These cases proceeded through the court as companion cases and were mostly handled together. In case number, 21CR221, the underlying case at issue here, appellant began filing a series of motions on June 3, 2021, including various motions for the appropriation of funds for an expert witness and for discovery. These motions were followed by another round of motions on June 21, 2021, seeking disclosure of grand jury transcripts, additional discovery, and a bill of particulars, among several others. Another round of motions was filed by appellant on July 19, 2021, followed by a waiver of speedy trial filed by appellant on August 5, 2021.

Thereafter, appellant filed a motion to suppress on January 3, 2022, followed by a supplemental motion to suppress on July

28, 2022. The motions applied to both pending cases and were heard together. Suppression hearings were held over the course of four days, with the trial court ultimately denying appellant's motions to suppress the results of the initial warrantless entry into his home, the purported consent searches of his home, as well as the subsequent searches of his cell phone, home, iPads, and security system conducted via warrant. The receiving stolen property case was dismissed on August 15, 2022. Subsequently, appellant orally revoked his speedy trial waiver on September 6, 2022, followed by a written revocation on September 23, 2022. Finally, Appellant filed a motion to dismiss based upon speedy trial grounds on October 21, 2022, which was denied by the trial court.

The matter then proceeded to a jury trial beginning on October 24, 2022. The trial took place over 13 days and resulted in a trial transcript exceeding 3500 pages. The State presented 58 witnesses and introduced 388 exhibits. The State's witnesses included law enforcement officers from both the Richland County Sheriff's Office and the Shelby Police Department, friends and family of the victim, appellant's niece, and forensic specialists from BCI, among several others.

Appellant testified on his own behalf and presented one additional witness, Julie Heinig, lab director of the DNA Diagnostic Center in Fairfield, Ohio. Appellant testified that he did not kill the victim. He claimed that just before he was leaving his house on the morning at issue, his former girlfriend and mother of another one of his children, Genevieve Adkins, arrived. He let her into the house and went to get his oil changed. He claimed that he returned to the house to find fires going in the backyard, vomit and urine in the house, and Adkins crying in the shower with blood and scratches on her. He testified that Adkins told him that the victim came into the house, hit her, and the two physically fought in the house. He also testified that he believed he saw the victim's car going around the corner as he approached the house. Adkins, however, did not testify at trial and the State disputed her existence.

Appellant was ultimately found guilty on all 17 counts of the indictment and is serving a lifetime prison sentence.

State v. Mack, 2025-Ohio-4812, ¶ 2-28 (5th Dist.)

{¶3} This Court ultimately affirmed appellant's convictions on October 21, 2025. *Id.*, *supra*, at ¶ 1. Appellant appealed that decision to the Supreme Court of Ohio on November 19, 2025. He thereafter filed a pro se application for reopening in this Court on December 2, 2025. Appellant raised two assignments of error in his application to reopen. Relevant to the present matter, appellant argued that his appellate counsel was ineffective for failing to raise on direct appeal the trial court's failure to comply with Sierah's Law, as set forth in R.C. 2903.42(A)(1)(a). On February 3, 2026, this Court denied appellant's application to reopen in part but granted it in part on the limited issues of the trial court's noncompliance with Sierah's Law, as well as original appellate counsel's ineffectiveness in not raising the argument on direct appeal. Thus, the appeal was reopened, counsel was appointed on behalf of appellant, and the above assignment of error is now before us for review.

LEGAL ANALYSIS

{¶4} As set forth above, appellant contends that the trial court reversibly erred in not complying with Sierah's Law and that appellate counsel was prejudicially ineffective for not raising this argument on direct appeal. The State

argues that appellant was not prejudiced by the error below and therefore that he cannot demonstrate that he received ineffective assistance of counsel.

{¶5} R.C. 2903.41 et seq., commonly known as Sierah’s Law, went into effect on March 20, 2019. *See* 2018 S.B. No. 231. Sierah’s Law created the Violent Offender’s Database (hereinafter “VOD”) and requires violent offenders convicted of specified offenses, including aggravated murder, murder, and kidnapping to enroll in the database. *See* R.C. 2903.41(A)(1)(a) and R.C. 2903.42(A)(1)(a). Sierah’s Law creates a presumption that violent offenders enroll in the database and provides enrollment for a minimum of ten years. Re-enrollment in the database is required on an annual basis. *See State v. Tupuola*, 2021-Ohio-2577, ¶ 36 (5th Dist.). This Court and other courts have observed that “the requirement to register with the VOD is remedial in nature, not punitive.” *Id.* at ¶ 41, citing *State v. Hall*, 2021-Ohio-1894, ¶ 32 (2d Dist.). Thus, classification as a violent offender and enrollment in the VOD is a collateral consequence of an offender’s criminal acts rather than a form of punishment. *Id.*

{¶6} R.C. 2903.42 governs enrollment in the VOD and states, in pertinent part, as follows:

(A)(1) For each person who is classified a violent offender, it is presumed that the violent offender shall be required to enroll in the violent offender database with respect to the offense that so classifies the person and shall have all violent offender database

duties with respect to that offense for ten years after the offender initially enrolls in the database. The presumption is a rebuttable presumption that the violent offender may rebut as provided in division (A)(4) of this section, after filing a motion in accordance with division (A)(2)(a) or (b) of this section, whichever is applicable. Each violent offender shall be informed of the presumption established under this division, of the offender's right to file a motion to rebut the presumption, of the procedure and criteria for rebutting the presumption, and of the effect of a rebuttal and the post-rebuttal hearing procedures and possible outcome, as follows:

(a) If the person is classified a violent offender under division (A)(1) of section 2903.41 of the Revised Code, the court that is sentencing the offender for the offense that so classifies the person shall inform the offender before sentencing of the presumption, the right, and the procedure, criteria, and possible outcome.

R.C. 2903.42 further explains the requirements that must be satisfied in order to rebut the presumption, stating in pertinent part, as follows:

(A)(4) If a violent offender files a motion under division (A)(2)(a) or (b) of this section, the offender has the burden of proving to the court that is sentencing, or that has sentenced, the offender, by a preponderance of the evidence, that the offender was not the principal offender in the commission of the offense that classifies the person a violent offender.

{¶7} Here, as stated in our prior decision granting appellant's application for reopening, although the trial court informed appellant that he would be classified as a violent offender and notified him of his registration duties under Sierah's Law, the trial court failed to inform him, as required by R.C. 2903.42(A)(1)(a), that presumption of enrollment in the VOD was rebuttable and that appellant could

rebut the presumption by filing a motion pursuant to R.C. 2903.42(A)(2)(a). The trial court further failed to inform appellant, before sentencing, of the “procedure and criteria for rebutting the presumption, and of the effect of a rebuttal and the post-rebuttal hearing procedures and possible outcome * * *.” R.C. 2903.42(A)(1)(a).

{¶8} No objection was raised to the trial court’s failure below. We noted in our prior decision that some courts have held that a trial court’s failure to provide these statutory notifications results in plain error requiring reversal and a remand for further proceedings. *See State v. Beard*, 2021-Ohio-2512, ¶ 60 (8th Dist.) (involving a guilty plea and the existence of co-defendants and finding that there was insufficient evidence upon which to conclude that appellant’s attempts to rebut the presumption would be futile); *State v. Wright*, 2021-Ohio-4107, ¶ 37 (2d Dist.) (reversing and remanding the matter where the trial court failed to inform the appellant of the statutory presumption, the right to rebut it, and the manner to do so); *State v. Sheets*, 2023-Ohio-2592, ¶ 38 (4th Dist.) (the court found reversible error in a case involving a defendant indicted for complicity under a theory of aiding and abetting).

{¶9} In the present case, we find that the trial court technically erred in failing to provide the statutory notifications to appellant related to his right to rebut the presumption of enrollment in the VOD and the manner in which to do so.

However, based upon the particular facts of this case, we cannot find that the trial court's failure resulted in plain error requiring reversal. This is because appellant cannot demonstrate that he was prejudiced as a result of the trial court's error.

{¶10} “ ‘To establish plain error, [an appellant] must show that an error occurred, that the error was obvious, and that there is “a reasonable probability that the error resulted in prejudice,” meaning that the error affected the outcome of the trial.’ ” (Emphasis omitted.) *State v. Roman-Navarre*, 2025-Ohio-3156, ¶ 45 (5th Dist.), quoting *State v. McAlpin*, 2022-Ohio-1567, ¶ 66, in turn quoting *State v. Rogers*, 2015-Ohio-2459, ¶ 22. *Accord State v. Bailey*, 2022-Ohio-4407, ¶ 8. These elements are “conjunctive,” meaning all three must apply to justify an appellate court's intervention. *Bailey* at ¶ 9, citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). Intervention by an appellate court for plain error is warranted only under exceptional circumstances to prevent a manifest miscarriage of justice. *Bailey* at ¶ 8, citing *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶11} Under plain-error review, the defendant bears the burden of “showing that but for a plain or obvious error, the outcome of the proceeding would have been otherwise, and reversal must be necessary to correct a manifest miscarriage of justice[.]” *Roman-Navarre* at ¶ 46. Importantly, the *Rogers* Court reaffirmed that even if an accused shows the trial court committed plain error affecting the

outcome of the proceeding, the appellate court is not required to correct it. *Rogers* at ¶ 23. The Supreme Court held:

[W]e have “admonish[ed] courts to notice plain error ‘with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.’ ” [*State v.*] *Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

Id., ¶ 23; *Accord State v. Perry*, 101 Ohio St.3d 118, 120 (2004).

{¶12} Appellant was convicted, as a principal offender, for aggravated murder, murder, kidnapping, and multiple other felony offenses related to the gruesome death of his ex-girlfriend. This case did not involve any co-defendants, and appellant was not charged as an aider or abettor or under a theory of complicity. Although appellant testified at trial, denied committing the offenses, claimed another person was present in the house on the morning when the crimes occurred, stated that he last saw appellant driving away from the house in her vehicle, the jury soundly rejected appellant’s testimony when it found him guilty as charged on all counts of the indictment.

{¶13} Thus, although we find the trial court technically erred in failing to provide the statutory notifications at issue, we cannot conclude that the error constituted plain error. *See Tupuola, supra*, at ¶ 46 (in a case involving trial counsel’s failure to file a motion to rebut the presumption that defendant was not the principal offender, this Court found it would have been “nigh impossible” for

Tupuola to rebut the presumption that she was not the principal offender of the offense of attempted murder where she was the sole perpetrator of the offense).

{¶14} As explained above, plain error requires a showing of prejudice, generally construed as a demonstration that the outcome of the proceedings would have been different but for the error. Here, no genuine argument can be made that appellant was not the principal offender, which is a required showing in order to rebut the presumption of enrollment in the VOD. Thus, even if a remand was ordered for the trial court to provide the notification and appellant filed a motion to rebut the presumption, there is insufficient evidence from which to conclude he was anything but the principal offender. Not only would appellant's attempt to establish that he was not the principal offender result in an exercise in futility, we believe it would result in a waste of judicial resources.

{¶15} Moreover, even assuming arguendo that this error does rise to the level of plain error, we cannot conclude that this case presents such an exceptional circumstance in which the plain error must be corrected. Simply put, the trial court's error here did not result in a manifest miscarriage of justice. As such, although we do find that the trial court technically erred, that error did not rise to the level of plain error requiring a reversal and remand for correction of the error.

{¶16} For essentially the same reasons that we find the error at issue did not rise to the level of plain error, we likewise cannot conclude that original appellate

counsel was ineffective for failing to raise the trial court's error on direct appeal.

To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

First, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonable representation. *Id.* at 688. Judicial scrutiny of counsel's performance is highly deferential, and a reviewing court must indulge a strong presumption that counsel's conduct constituted reasonable professional assistance and sound trial strategy. *Id.* at 689. Moreover, this Court has recognized that “judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every ‘colorable’ issue.” *State v. Eutsey*, 2020-Ohio-2756, ¶ 16 (5th Dist.).

{¶17} Second, the defendant must demonstrate prejudice. *Id.* at 692. “To establish prejudice, the defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.” *State v. Krichbaum*, 2026-Ohio-3086, ¶ 63 (5th Dist.). A reasonable probability is one sufficient to undermine confidence in the outcome. *Strickland* at 694. *See also Krichbaum* at ¶ 63, citing *State v. Harris*, 2024-Ohio-2993, ¶ 28-29 (5th Dist.).

{¶18} We have already determined that appellant was not prejudiced by the trial court's failure to inform him of the rebuttable presumption related to his

enrollment in the VOD. Thus, he cannot now demonstrate that appellate counsel was ineffective for failing to assign error on that basis on direct appeal. Because an effort by appellant to prove, by a preponderance of the evidence, that he was not the principal offender would have been “nigh impossible,” any motion to rebut the presumption that he be enrolled in the VOD would have been denied. Importantly, we are reminded that “[c]ounsel is not ineffective for failing to make a futile motion.” *Krichbaum* at ¶ 66, citing *State v. Ray*, 2025-Ohio-2023, ¶ 64 (5th Dist.).

{¶19} Here, there is no reasonable probability that the outcome of the trial would have been different had original appellate counsel raised the issue of the trial court’s failure to notify him of the rebuttable presumption provisions contained in Sierah’s Law. Thus, we cannot conclude that appellant has established that his original appellate counsel was deficient or that he was prejudiced as required by *Strickland*. Further, we find it important to note at this juncture that, with respect to our prior determination that appellant’s appeal should be reopened, the Supreme Court of Ohio has stated as follows regarding the reopening process:

We note that the determination that a genuine issue of ineffective assistance of appellate counsel exists is not a determination of ineffective assistance of appellate counsel. *See State v. Fain*, 188 Ohio App.3d 531, 2010-Ohio-2455, 936 N.E.2d 93, ¶ 20 (1st Dist.) (Cunningham, P.J., concurring in part and dissenting in part) (“[A] court's determination that an App.R. 26(B) claim is colorable is not determinative of the court's ultimate disposition of a reopened appeal”), abrogated on other

grounds by *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509. Under App.R. 26(B), the determination whether appellate counsel was deficient and prejudiced the applicant is to be made after the appeal has been reopened and the parties are afforded the opportunity to have counsel, transmit the necessary record, and substantively brief the issues. *See* App.R. 26(B)(6) through (9). To prevail, the applicant will still have to establish that ineffective assistance of appellate counsel undermined at least one meritorious direct-appeal issue. And courts of appeals are in the best position to recognize whether a person has received deficient representation from appellate counsel and whether he has also been prejudiced by that deficient representation. *Morgan [v. Eads]*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, at ¶ 6; [*State v.*] *Murnahan*, 63 Ohio St.3d [60], at 65, 584 N.E.2d 1204 [(1992)].

State v. Leyh, 2022-Ohio-292, ¶ 37.

{¶20} Therefore, having found no merit in the assignment of error raised by appellant in this reopened appeal, we confirm our prior judgment.

JUDGMENT AFFIRMED.

{¶21} The Judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

By: Smith, J.

Hoffman, J. and

Hess, J. concur.