

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	: Case No. 2020-0312
Plaintiff-Appellee,	:
	: On Appeal from the
v.	: Stark County Court of Appeals,
	: Fifth Appellate District,
THEODIS MONTGOMERY,	: Case No. 2019CA00012
	:
Defendant-Appellant.	:

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**MERIT BRIEF OF APPELLANT THEODIS MONTGOMERY**

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**An appellant is denied his right to a fair trial guaranteed by the 6th and 14th amendments to the United States Constitution when a trial court permits an alleged victim to be introduced to the jury during voir dire as representing the State of Ohio and permits them to sit with the Prosecutor at counsel table throughout the entire trial in front of the jury. ....8**

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## STATEMENT OF THE CASE AND FACTS

This case concerns the credibility and believability of A.B. compared with that of Theodis Montgomery. A.B., the alleged victim, sat at counsel table during voir dire and the trial and was introduced to the jury as a representative of the State. These actions by the State, and allowed by the trial court, impermissibly bolstered her credibility in a case that rested solely on her credibility.

### **I. Over Mr. Montgomery's objection, the trial court allowed A.B. to sit at counsel table and introduced her to the jury as a representative of the State.**

On the day of trial, the State informed the court of its decision to designate A.B. as its representative. (November 13, 2018 Vol. 1 Tp. 10.) Defense counsel objected both to her designation as a representative of the State and to her presence at counsel table:

Judge, I would object to the request by the State of Ohio to designate the alleged victim in this case as a State's representative. [A.B.] has no affiliation with the State of Ohio in any capacity. Her presence here as a victim, alleged victim, and a witness for the State of Ohio, and if the State wants to keep her in the courtroom during the entirety of the trial while Mr. Montgomery is here, she can sit as a witness in the courtroom, but I think to keep her at counsel table would be prejudicial to Mr. Montgomery, and I would ask that the request not be granted. I've, I've never seen this request in the past in my career. I don't know what the practice is here in Stark County, but I would object.

(*Id.* at 11.) The trial court overruled the objection stating:

Well, it's not – I don't think it's so much Stark County, I think it's, you know, we have a new era under Marsy's law and under 2930 and the amendment to the Constitution. I think it's different because I will agree with you that I have never had this particular situation arise either. Certainly representatives have been designated, but given the amendment to the Constitution that was passed by voters of the State of Ohio, and given my understanding of that law, I think that [the prosecutor] is certainly correct in the statement that she does have, according to that, a right to be present in the courtroom for that.

(*Id.* at 11-12.) The potential jurors were then brought into the room. The trial court proceeded to introduce those seated at counsel table:

I would like to introduce everyone in the room to you so that you know who we all are. \*\*\* The Stark County Prosecutor is John Ferrero, representing his office today is Attorney Mike Bickis. \*\*\* And seated with him is the State's representative in this case, [A.B.].

(*Id.* at 47.)

## **II. The State's case relied on the testimony of A.B.**

A.B. was the first witness to testify. Additional witnesses for the State included Loralee Bidlingmaier, the SANE nurse who examined A.B.; Detective Mongold, who investigated the case; and Samuel Troyer, the BCI technician who analyzed samples collected from A.B.. (November 14, 2018 Vol. II Tp. 336, 514, 579; November 15, 2018 Vol. III Tp. 626.) A.B. admitted she spent time with Mr. Montgomery in 2017. (November 14, 2018 Vol. II Tp. 345.) They would smoke marijuana, and watch Netflix together. (*Id.* at 345.) Mr. Montgomery set up her Roku stick. (*Id.*) Mr. Montgomery gave A.B. rides and money. (*Id.* at 346.)

According to A.B., her relationship with Mr. Montgomery's deteriorated in December of 2017 when Mr. Montgomery created a fake Facebook page in the name of Michael Strychalski. (*Id.* at 349-350.) A.B. and Mr. Strychalski were in a relationship while Mr. Strychalski was incarcerated. (*Id.* at 340-342.) Mr. Strychalski was set to be released from prison 96 days after the March 16, 2018 incident. (*Id.* at 341.)

On March 15, 2018, A.B. went to her father's house, where Mr. Montgomery also lived, to smoke marijuana with her father. (*Id.* at 353, 356.) A.B. decided to stay the night and slept on the floor in the back room. (*Id.* at 357-361.) The next morning, after the rest of the family left for vacation, A.B. said she was awoken by Mr. Montgomery barging into the room, yelling, and punching her in the mouth. (*Id.* at 362-365.) A.B. then went to the restroom, and testified Mr. Montgomery watched. (*Id.* at 367-368.)

A.B. testified Mr. Montgomery then moved her to the basement by holding her wrist. (*Id.* at 368-369.) A.B. claimed Mr. Montgomery threatened her with zip ties and then made her choose a punishment – cleaning out a dog kennel. (*Id.* at 371-372, 375-378.) After sitting in the basement,

Mr. Montgomery told her he wanted to take a shower. (*Id.*) A.B. volunteered to accompany Mr. Montgomery to the bathroom while he showered instead of staying in the basement. (*Id.* at 378.) A.B. claims that, once in the bathroom, Mr. Montgomery made her take her clothes off, take a shower with him, and engage in vaginal intercourse. (*Id.* at 378-380.)

After the shower, Mr. Montgomery allegedly carried A.B. over his shoulder back into the back room where she slept. (*Id.* at 381.) A.B. said that, while back in the room, Mr. Montgomery got on top of her and they engaged in vaginal intercourse. (*Id.* at 382.) According to A.B., Mr. Montgomery asked if she wanted him to stop. When she said yes, Mr. Montgomery stopped. (*Id.* at 382.) Mr. Montgomery and A.B. then sat talking about their children before Mr. Montgomery cooked a meal. (*Id.* at 383-384.)

A.B. testified that, Mr. Montgomery threatened to keep her tied up until her family returned from their vacation. (*Id.* at 386-387.) When A.B. told Mr. Montgomery she had a headache and wanted to go, he said “Okay, yeah.” (*Id.* at 387.) A.B. testified that she then gathered her daughter’s birthday gifts and left the house. (*Id.* at 387-388.)

After leaving her father and Mr. Montgomery’s home, A.B. called her sister, Nicole Johnson, and then spoke with Mr. Strychalski. (*Id.* at 389-391.) A.B. then spoke with her father who was in Florida. (*Id.* at 391.) She went to the Mercy Medical Center and called police. (*Id.* at 391, 399-400.) At the hospital Ms. Bidlingmaier examined A.B. and collected evidence. (*Id.* at 524-535.)

Officer’s Schmidt, Stern and Detective Mongold arrived at Mercy Medical Center, where they met A.B. (*Id.* at 581.) After leaving the hospital, Det. Mongold received consent from A.B.’s father to enter the house he shared with Mr. Montgomery. (*Id.* at 584-585.) Det. Mongold and Det.

Weirich used an alternate light source to search the home for trace evidence and found none. (*Id.* at 587.) The detectives collected a bloody tissue and took photos of the home. (*Id.* at 587-589.)

Samuel Troyer, a DNA analyst from BCI, tested the vaginal and anal/perianal samples collected from A.B. at the hospital. (November 15, 2018 Vol. III Tp. 631; State's Exhibit 9.) He determined that the samples were positive for acid phosphatase, a concentrated protein found in semen. (*Id.* at 633.) Mr. Montgomery was included as a potential contributor of the tested samples. (*Id.* at 634; State's Exhibit 9.)

### **III. The defense argued Mr. Montgomery and A.B. had a consensual sexual relationship.**

Defense counsel questioned A.B. on the nature of her relationship with Mr. Montgomery and attacked her credibility through witness testimony. Witnesses for the defense included A.B.'s sister, A.B.'s father, A.B.'s grandmother, A.B.'s grandfather; and Julio Garcia, who lived in a van parked next to the house in which Mr. Montgomery and A.B.'s father lived.

To impeach her testimony, defense counsel questioned A.B. on her texting habits with Mr. Montgomery, the discrepancies in her report to police, and her timeline of events. A.B. testified that in the more than fifteen years that she has known him, Mr. Montgomery has never been violent towards her. (November 14, 2018 Vol. II Tp. 499.) In the span of two days in December 2017, Mr. Montgomery and A.B. texted 53 times, starting at 4AM. (November 14, 2018 Vol. II Tp. 407-416.) When Officer Stern and Detective Mongold interviewed A.B. at the Mercy Hospital, she failed to tell him that she went to the bathroom and Mr. Montgomery watched her. (*Id.* at 461-464.) Counsel also questioned A.B.'s body placement at the time of the alleged punch and whether she could be injured on the right side of her face due to her body placement on the ground. (*Id.* at 446-455.) A.B. testified that she was bleeding from the punch, yet no blood was found on anything that she touched or on the floor of the house. (*Id.* at 464-467.)

A.B.'s father was not surprised when his daughter showed up to his home on March 15, 2018. (*Id.* at 671.) His family would come and go frequently. (*Id.*) Also, A.B.'s father believed that she and Mr. Montgomery were "creeping around, messing around." (*Id.* at 676.) A.B.'s father thought they were "seeing each other here and there." (*Id.* at 677.) In that context, he was not concerned that Mr. Montgomery and A.B. were at the house alone on March 16, 2018 because he "thought they was doing – shooting it regular, doing it, you know." (*Id.* at 681.) While in Florida, A.B.'s father received a call from his daughter, Nicole, about the incident at his house. (*Id.*) After this call, A.B.'s father made several calls to A.B. and to Mr. Montgomery. (*Id.* at 681-696.) He found out from Mr. Montgomery that they had sex and A.B. confirmed that on a follow-up call with him. (*Id.* at 692-694.)

A.B.'s grandmother and grandfather both testified. A.B.'s grandmother spoke with her father on the night of the incident. (*Id.* at 745-746.) She stated the phone call didn't sound "like a frantic phone call. Like some your grandkids would, you know, be screaming, hollering and yelling, or something, wasn't nothing like that." (*Id.* at 746.) When A.B.'s grandmother saw her the following day, she acted "like nothing happened." (*Id.* at 755.)

When A.B.'s grandfather heard something happened to her on March 16, 2018, his response was: "I'm not going nowhere because I know how my granddaughter is." (*Id.* at 767.) He did go over to the house and let officers in to collect evidence. (*Id.* at 767-768.) A.B.'s grandfather saw her the day after the incident. (*Id.* at 781.) He questioned her "If all this happened what you said, where's the marks on your face at? ... [I]f your nose is busted and bleeding now, I said, you would have had black eyes or something. I said, where's all these marks at." (*Id.* at 781-782.) A.B. became enraged when no one believed her and "storm[ed] out the house and knock[ed] the grill

down.” (*Id.* at 661, 782.) A.B.’s sister and grandparents testified the house looked normal and was not in disarray. (November 15, 2018 Vol. III Tp. 652-653, 749-750, 771.)

The final defense witness was Julio Garcia, a homeless man who was living in a van outside of the house where Mr. Montgomery and A.B.’s father lived. (*Id.* at 804.) On the day the allegations reference, Mr. Garcia saw Mr. Montgomery in the backyard throwing away cardboard. (*Id.* at 808.) Mr. Garcia also saw Mr. Montgomery and A.B. come outside of the house together. (*Id.* at 811-812.) According to Mr. Garcia, they were acting “cool” together, Mr. Montgomery carried a gift bag to A.B.’s car. (*Id.* at 812.) Mr. Garcia did not see any injuries to Ms. Burt’s face. (*Id.* at 817.)

#### **IV. Court proceedings.**

A.B. pressed charges and Mr. Montgomery was indicted on July 12, 2018 for kidnapping with a repeat violent offender specification and with a sexual motivation specification and rape with a repeat violent offender specification. (Stark County Common Pleas Court Case 2018CR1205, July 12, 2018 Indictment.) After a three-day jury trial, Mr. Montgomery was convicted of all charges. (November 16, 2019 Jury Verdict.) The Court held a repeat violent offender hearing on November 27, 2018 and found Mr. Montgomery to be a repeat violent offender. (RVO Hearing November 27, 2019 Tp. 28-30.) The trial court sentenced Mr. Montgomery to ten years for kidnapping to run concurrently to a sentence of ten years for rape. (*Id.* at 49.)

Mr. Montgomery filed a timely appeal in the Fifth District Court of Appeals. The Court of Appeals affirmed Mr. Montgomery’s convictions. (Case No. 2019CA12, December 9, 2019 Opinion.) The Court of Appeals determined under the Ohio Constitution, Article I, Section 10a, commonly referred to as “Marsy’s Law,” Evid. R. 615(B)(4), and R.C. 2930.09, the victim has the

right to be present in the court room at any stage of the proceeding. (*Id.* at ¶ 18-24.) The appellate court found there was only a generalized assertion of prejudice and it is clear the victim's presence is permitted in by statute and the Constitution. (*Id.* at ¶ 24.) The appellate court did not address the specific argument of the victim sitting at counsel table or being introduced to the jury as a representative of the State. (*Id.* at ¶ 18-24.) Mr. Montgomery filed a motion for reconsideration, which was denied. He additionally filed a motion to reopen his appeal, which was also denied.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### PROPOSITION OF LAW

**An appellant is denied his right to a fair trial guaranteed by the 6th and 14th amendments to the United States Constitution when a trial court permits an alleged victim to be introduced to the jury during voir dire as representing the State of Ohio and permits them to sit with the Prosecutor for the State at counsel table throughout the entire trial in front of the jury.**

#### **I. Introduction.**

The State summarized this case during opening: “At the end of the trial, you all are going to have a hard decision. You’re going to decide whether you believe this young woman...” (November 13, 2018 Vol. 1 Tp. 300.) Fundamentally, this is a he-said, she-said case where the sole question for the jury to decide was whether the sexual intercourse was consensual. To find Mr. Montgomery guilty of rape and kidnapping, the jury needed to believe A.B. instead of Mr. Montgomery’s witnesses.

By allowing A.B. to sit at counsel table as the State’s expressly declared representative, the trial court functionally permitted the State to vouch for her credibility. And though the trial court based its decision on Article I, Section 10a of the Ohio Constitution, there is nothing in the text of Marsy’s Law that gives victims the right to sit at counsel table with the prosecutor as the State’s representative. Because Marsy’s Law does not require trial courts to permit victims to sit at counsel table with the State, this case does not present a conflict between the Constitutional rights of defendants and the Constitutional rights of victims. Instead, it is solely about Mr. Montgomery’s right to a fair trial, which was undermined by the placement of A.B. at counsel table and the declaration that she was there as a representative of the State. This prejudiced Mr. Montgomery and necessitates the reversal of his conviction.

## **II. Allowing a victim to sit as the State’s representative denies defendants the right to a fair trial.**

### **A. The Constitutional framework.**

A defendant has the constitutional right to a fair trial. The Supreme Court of the United States has recognized that “certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial.” *Carey v. Musladin*, 549 U.S. 70, 72, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006), citing *Estelle v. Williams*, 425 U.S. 501, 503-506, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). The United States Constitution prohibits any courtroom practice or arrangement which undermines the presumption of innocence and fairness in the fact-finding process. *United States v. Larson*, 460 F.3d 1200 (9th Cir. 2006) *aff’d en banc*, citing *Deck v Missouri*, 544 U.S. 622, 630, 125 S.Ct. 2007, 61 L.Ed.2d 953 (2005).

This presumption is undermined when the practice or arrangement creates an unacceptable risk of impermissible factors coming into play. *Larson*, 460 F.3d at 1214, quoting *Estelle*, 425 U.S. at 505. A courtroom practice or arrangement that creates such risk is inherently prejudicial regardless of actual prejudice. *Flynn*, 475 U.S. at 586; *Estelle*, 425 U.S. at 503-511, citing *Turner v. Louisiana*, 379 U.S. 466, 471-474, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965).

### **B. Allowing victims to sit as the State’s representative vouches for and bolsters their testimony and undermines the presumption of innocence.**

#### **1. Law enforcement is often designated as the State’s representative.**

It is well settled that “in a criminal prosecution, a representative of the law enforcement agency handling the prosecution – even if the representative is a witness – may assist the prosecutor during trial and may remain in the courtroom although separation of witnesses has been ordered.” *State v. Fuller*, 1st Dist. Hamilton No. C-960753, 1997 WL 598404, \*1 (Sept. 26, 1997), *aff’d* 83

Ohio St.3d 108, 698 N.E.2d 977 (1998). Moreover, trial courts have discretion to allow a State's designated representative to avoid sequestration requirements under Evid.R. 615(2). *See United States v. Wells*, 437 F.2d 1144, 1146 (6th Cir.1971); *State v. Carbone*, 11th Dist. Trumbull Case No. 96-T-5390, 1997 WL 799557, \*4 (Dec. 19, 1997). The Sixth Circuit, when interpreting the analogous federal rule of evidence, has stated "[t]he law in this circuit was settled that the case agent may remain in the courtroom even when other witnesses were being sequestered." *United States v. Martin*, 920 F.2d 393, 397 (6th Cir.1990). But case agents are the exception to the sequestration rule because, unlike other witnesses:

The case agent is the prosecutor's information source and even if the agent were excluded, the prosecutor would still have to reveal to him what other witnesses had said and done in order to map out strategy. This would defeat the whole purpose of sequestration.

*Id.* at 397.

A.B. does not fall into the same category as a law enforcement officer. Her integrity and credibility were directly questioned in this case. A police officer investigating a crime is more regularly testifying to the procedural actions they took in the case; their personal credibility is not often questioned to the same extent that A.B.'s was in this case. Additionally, unlike law enforcement, A.B. was not able to assist the prosecution with its other witnesses. As a final distinction, police officers and prosecutors are both agents of the government involved in a criminal prosecution. While they both represent the State in different capacities, the same cannot be said about A.B.

**2. The prosecutor vouched for A.B.'s credibility by designating her as the representative of the State of Ohio and allowing her to sit at counsel table.**

Vouching occurs when a prosecutor "implies knowledge of facts outside the record or places his or personal credibility in issue." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 232.

This Court has given the State latitude to make missteps that relate to witness credibility. This Court has held that improper questions that are isolated in time do not constitute prosecutorial vouching. *State v. Skatzes*, 104 Ohio St.3d 195, ¶ 188, 2004-Ohio-6391, 819 N.E.2d 215. In *Skatzes*, the prosecutor made several statements related to its investigation and inmate testimony. When the prosecutor’s statements were improper, objections were sustained by the trial court. *Id.* at ¶ 182-188. This Court determined these minor statements were isolated incidents and the prosecutor’s questions could not be taken out of context. As a result, there was no vouching. *Id.* at ¶ 188. In *State v. Cornwell*, this Court found questions concerning plea bargains to be “brief, not overly emphasized, and were made at the close of the prosecutor’s examination of each witness. Given the isolated nature of these particular questions to these witnesses, these questions should not be misinterpreted, taken out of context, or given their most damaging meaning.” *State v. Cornwell*, 86 Ohio St.3d 560, 571, 1999-Ohio-125, 715 N.E.2d 1144.

While verbal missteps may not amount to vouching, pervasive unspoken actions may still be vouching. In *Mask v. State*, the Arkansas Supreme Court recognized that the seating arrangements in court can, in some circumstances, vouch for witness credibility. *Mask v. State*, 314 Ark. 25, 26, 869 S.W.2d 1 (1993). (Internal citations omitted). The Arkansas Court stated that several dangers arise when the victim sits at counsel table, “manipulation of the seating arrangement \* \* \* [can] emphasize the testimony of certain witnesses over others.” *Id.* The seating arrangement can also be “tantamount to the trial court expressing an opinion on the credibility of certain witnesses over others.” *Id.* The Arkansas Supreme Court went on to hold that because Rule 616<sup>1</sup> does not contain language allowing a victim to sit at counsel table, allowing the victim to remain at counsel table after her testimony was in error. *Id.*

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<sup>1</sup> A.R.E. 616 is entitled Right of Victim to Be Present at Hearing.

This case does not involve offhand remarks, it involves unspoken pervasive vouching. The prosecutor allowed the alleged victim to sit at counsel table for the duration of the trial, including voir dire, and introduced her to the jury as a representative of the State of Ohio. This was not an isolated incident but rather one that permeated the entirety of the trial and put the victim on display, seated next to the prosecutor. Her placement there conveyed to the jury that the prosecutor was vouching for her and her testimony. Put another way, while A.B. was testifying that Mr. Montgomery had raped her, she was doing so not only as the victim, but as the State of Ohio's expressly chosen representative. Additionally, having allowed that placement, the trial court itself risked the appearance of endorsing A.B.'s testimony. By cloaking the alleged victim's testimony with the imprimatur of the State of Ohio, her statements alleging rape were bolstered.

**III. A victim's right to be present and participate in the criminal process does not create a right for the victim to sit at counsel table as the State's expressly declared representative.**

A.B.'s presence as the State's representative violated Mr. Montgomery's right to a fair trial. But this is not a case where Mr. Montgomery's constitutional rights were in tension with A.B.'s statutory or constitutional rights. Simply put, A.B. has no protected right to sit at counsel table and be declared the representative of the State.

**A. Victim's interests are distinct and do not necessarily align with the State's interests.**

There were three distinct entities with legally recognized interests in this case, Mr. Montgomery, the State of Ohio, and A.B. A.B. has her own separate right to counsel through the Ohio Constitution, Art. 1, Section 10a. The Stark County Prosecutor's office is not A.B.'s attorney. As Crim.R. 2 states, the definition for prosecuting attorney means the attorney general of this state, the prosecuting attorney of a county, the law director, city solicitor, or other officer *who prosecutes a criminal case on behalf of the state* or a city, village, township, or other political subdivision...

(Emphasis added.) Crim.R. 2(G). State is defined as the “state, a county, city, village, township, or other political subdivision, or any other entity of *this state that may prosecute a criminal action.*”

(Emphasis added.) Crim.R. 2(H). A.B. does not fall into the definitions of the State or of the prosecuting attorney. Crim.R. 2.

Rather, the State and A.B. have distinctly different purposes in pursuing a criminal action. As noted by the American Bar Association:

The Prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of the victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

Criminal Justice Standards for the Prosecution Function, Fourth Ed. 2017, Part 1, Standard 3-1.2(B). A prosecutor should consider the interests of the victim, but they are not bound by them. A victim may seek justice for themselves personally, as in a civil suit, while the prosecutor is concerned about the entire community. Victims and the State are not one in the same, their interests may align in certain cases, but diverge in others. This is often the case when a prosecutor institutes a criminal proceeding without victim support or contribution, seen often in domestic violence situations, or when the State views a plea offer as the best resolution while the victim does not.

A.B. is not the State, regardless of the State’s designation that she represents the State of Ohio.

**B. Ohio law does not give A.B. or any other victim the right to sit at counsel table as the State’s representative.**

Victims’ rights have changed drastically in Ohio in the last few years. On February 5, 2018, the amendment to Article I, Section 10a of the Ohio Constitution, commonly known as Marsy’s Law, became effective. The amendment expands the rights afforded to victims of crimes. *State v.*

*Lee*, 12th Dist. Warren No. CA2018-11-134, 2019-Ohio-4725, ¶ 12. Specifically, Marsy’s Law affords the right “upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings.” Ohio Constitution, Article I, Section 10a(A)(2). Marsy’s Law also afford a victim the right “to confer with the attorney for the government.” Ohio Constitution, Article I, Section 10a(A)(9). Importantly, Marsy’s Law defines the term “victim” as “a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act.” Ohio Constitution, Article I, Section 10a(D).

The Ohio Rules of Evidence provide a rule for separation and exclusion of witnesses. The relevant portions of Evid.R. 615 states:

**(A)** Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the “exclusion” or “separation” of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

**(B)** This rule does not authorize exclusion of any of the following persons from the hearing:

(2) an officer or employee of a party that is not a natural person designated as its representative by its attorney;

(4) in a criminal proceeding, an alleged victim of the charged offense to the extent that the alleged victim's presence is authorized by statute enacted by the General Assembly or by the Ohio Constitution. As used in this rule, “victim” has the same meaning as in the provisions of the Ohio Constitution providing rights for victims of crimes.

Ohio statute further allows a victim to be present. R.C. 2930.09 states:

A victim in a case may be present whenever the defendant or alleged juvenile offender in the case is present during any stage of the case against the defendant or alleged juvenile offender that is conducted on the record, other than a grand jury proceeding, unless the court determines that exclusion of the victim is necessary to protect the defendant's or alleged juvenile offenders right to a fair trial or to a fair delinquency proceeding. At any stage of the case at which the victim is present, the court, at the victim's request, shall permit the victim to be accompanied by an

individual to provide support to the victim unless the court determines that exclusion of the individual is necessary to protect the defendant's or alleged juvenile offenders right to a fair trial or to a fair delinquency proceeding.

The plain language of the Ohio Constitution, R.C. 2930.09, and Evid.R. 615 favor allowing the victim to be present in the courtroom. However, none of these authorities explicitly give a victim the right to sit at counsel table as the State's expressly declared representative. Even Marsy's Law, which provides victims the right "upon request, to confer with the attorney for the government" does not provide a right to real-time consultation in the middle of a trial. Ohio Constitution, Article I, Section 10a(A)(9). Victims have the explicit right to confer with prosecutors, but not to guide the litigation as their representative.

**C. Jurisdictions that routinely allow victims to sit at counsel table as the State's representative do so based upon explicitly defined victim's rights.**

Like Ohio, Florida has enacted a constitutional victim's bill of rights. Florida Constitution, Article 1, Section 16(b). A Florida Court determined that a victim's family members do not have a State Constitutional right to sit at counsel table. *Hall v. State*, 579 So.2d 329, 330 (Fla. Dist. Ct. App. 1991). The Florida appellate court held they "do not construe Article I, section 16(b), of the Florida Constitution to permit victims or their families to actively participate in the conduct of the trial by sitting at counsel table or being introduced to the jury." *Id.* at \*331. In contrast to Florida and Ohio, an Alabama statute explicitly allows victims to sit at counsel table. Ala. § 15-14-53. The Alabama statute has been upheld by Alabama state courts. *Crowe v. State*, 485 So.2d 351, 362-63 (Ala. App. 1984), *rev'd on other grounds*, 485 So.2d 373 (Ala. 1985), *cert. denied*, 477 U.S. 909, 106 S.Ct. 3284, 91 L.Ed.2d 573 (1986).

**IV. Reversal is warranted, at the very least, when a victim sits at counsel table as the State’s expressly declared representative in a way that causes prejudice to the defendant.**

This Court has not determined whether a victim may sit at counsel table for the entirety of the trial. Given the weighty Constitutional issues at stake, this Court could find structural error when an alleged victim sits at counsel table. But, at the very least, this Court should apply a harmless error standard to the question, in line with *State v. Bryant*, Ohio’s one reported case on the issue. *State v. Bryant*, 105 Ohio App. 452, 453-54, 152 N.E.2d 678 (2d Dist. 1957).

In *Bryant*, the Court determined the victim’s wife—while sitting at counsel table with the prosecutor—did not make emotional displays, demonstrations, or statements. *Id.* at 679. The trial judge also cautioned the jury when she was asked to withdraw during an emotional moment. *Id.* Consequently, the court of appeals found no prejudicial error.

This approach—evaluating whether there was prejudice from seating a victim at counsel table with a prosecutor—is consistent with most jurisdictions that have considered the issue. California has left open the question of whether a victim may sit at counsel table. A California court recognized “the presence of the victim at the counsel table does increase the possibility of both emotion and jury focus on factors which may not be consistent with the jury trial process involved in assessing criminal guilt,” however, the Court did not prohibit the victim from sitting at counsel table. *People v. Ramer*, 17 Cal.App.4th 672, 679, Cal.Rprt.2d 480, 484 (1993). California courts then went on to hold, “[T]he presence of the victim at counsel table is not necessarily forbidden, nor is it per se prejudicial to a criminal defendant.” *People v. Paredes*, F034525 (Sup.Ct.No. SC78224A), 2001 WL 1555365 (Dec. 6, 2001). In California, a defendant would need to show there are overriding prejudice interests that would prevent the victim from

sitting at counsel table. *Id.* at \*20-21. Louisiana and Arkansas apply a similar analysis. *Mask*, 314 Ark. at 26; *State v. McGinnis*, 917 So.2d 471, 481 (La.App. 5 Cir 10/06/05).

**V. A.B.'s presence as the State's expressly declared representative prejudiced Mr. Montgomery's right to a fair trial.**

Here, unlike in *Bryant*, the jury was never instructed about how to perceive A.B.'s placement as the State's representative. And, unlike *Bryant*—where the credibility of the victim's wife was not challenged—A.B.'s credibility was the central trial issue. The State bolstered the credibility of its key witness by sitting her next to the trial prosecutor and telling the jury that she was a representative of the State. This type of impermissible vouching led to Mr. Montgomery's conviction, despite his defense that he had consensual sex with A.B.—a defense supported by many of A.B.'s family members.

**CONCLUSION**

Ohio law permits a victim to be present in the courtroom; but it does not allow a victim to be present at counsel table and be introduced to the jury as a representative of the State of Ohio. The State's actions bolstered the alleged victims' testimony in what is otherwise a trial based entirely on her credibility. This Court should reverse the decision of the court of appeals.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

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COUNSEL FOR THEODIS MONTGOMERY

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **MERIT BRIEF OF APPELLANT THEODIS MONTGOMERY** was served by electronic mail to Kristine W. Beard, Stark County Assistant Prosecutor, kwbeard@starkcountyohio.gov, on this 13th day of July, 2020.

*/s/: Addison M. Spriggs*  
\_\_\_\_\_  
ADDISON M. SPRIGGS,0097713  
Assistant State Public Defender

COUNSEL FOR THEODIS MONTGOMERY

#1324334

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	: Case No. 2020-0312
Plaintiff-Appellee,	:
	: On Appeal from the
v.	: Stark County Court of Appeals,
	: Fifth Appellate District,
THEODIS MONTGOMERY,	: Case No. 2019CA00012
	:
Defendant-Appellant.	:

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**APPENDIX TO**

**MERIT BRIEF OF APPELLANT THEODIS MONTGOMERY**

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

2020 JAN 22 PM 3:55  
CLERK OF COURT  
STARK COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

-vs-

THEODIS MONTGOMERY

Defendant-Appellant

JUDGMENT ENTRY

Case No. 2019CA00012

Appellant has filed a motion to reconsider this Court's December 9, 2019 decision pursuant to App. R. 26(A).

Pursuant to App.R. 26(A), a party may file an application for reconsideration of an appellate court decision. The standard for reviewing such an application is whether the application "calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515, paragraph one of the syllabus (1987).

"An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (1996).

*[Handwritten signature]*

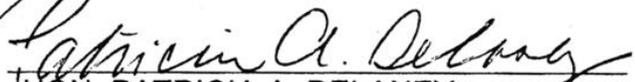
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LOUIS GIIVASIS, CLERK  
By ..... Deputy  
Date ..... 1-22-2020

In the instant case, Appellant does not call our attention to an obvious error in our decision or raise an issue that we failed to consider. Accordingly, the motion to reconsider is overruled.

IT IS SO ORDERED.

  
HON. WILLIAM B. HOFFMAN

  
HON. JOHN W. WISE

  
HON. PATRICIA A. DELANEY

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO  
2019 DEC -9 PM 2:31

STATE OF OHIO

Plaintiff-Appellee

-vs-

THEODIS MONTGOMERY

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 2019CA00012

OPINION

CHARACTER OF PROCEEDINGS:

Appeal from the Stark County Court of  
Common Pleas, Case No. 2018CR1205

*Hartnett*

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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Prosecuting Attorney  
Stark County, Ohio

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Canton, Ohio 44702

4  
ENTERED BY 13

A TRUE COPY TESTE:  
LOUIS P. GIAVASIS, CLERK

By *[Signature]* Deputy

Date 12-9-19

*Hoffman, P.J.*

{¶1} Appellant Theodis Montgomery appeals the judgment entered by the Stark County Common Pleas Court convicting him of kidnapping (R.C. 2905.01(A)(5) and/or (B)(2)) and rape (R.C. 2907.02(A)(2)) and sentencing him to ten years incarceration. Appellee is the state of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} A.B. has known Appellant about ten years, as her father is married to A.B.'s sister. A.B. was engaged to Michael Strychalski, who was in prison. While Michael was in prison, A.B. and Appellant would hang out to smoke weed and watch Netflix. However, A.B. eventually realized Appellant was interested in a romantic relationship with her. She did not share his feelings and wanted to remain friends. Appellant gave A.B. money and weed and gave her rides to work in an attempt to win her affection. While she accepted his gifts, she maintained she did not want a romantic relationship with Appellant.

{¶3} In December of 2017, A.B.'s car broke down. Appellant volunteered to repair her car, and told her to leave the car behind Heggy's Ice Cream in Canton. While he was repairing the car, A.B. learned Appellant had created a fake Facebook page in Strychalski's name, inferring on the page she had engaged in a sexual relationship with Appellant. She confronted Appellant in anger, and Appellant left without finishing the car repairs. A.B. broke off contact with Appellant after this incident.

{¶4} On March 15, 2018, A.B. was working at Ameridial. Her father called her around 11:00 p.m., asking her to bring him marijuana. Her father and his family were flying to Florida the next morning for vacation. She went to her father's house and smoked weed with him until around 1:00 a.m. Because of the late hour, A.B. decided to spend the night. She made a bed on the floor and went to sleep.

{¶15} A.B. woke up around 4:00 a.m. when her father told her they were getting ready to leave for the airport. Appellant, who was living at the house, stayed behind. Around 7:00 or 8:00 a.m., she awakened again when she received a call from Strychalski. She fell asleep while on the phone. She was later awakened by Appellant who yelled, "What the F are you here for, why are you here?" Tr. 365. When A.B. tried to get up, Appellant punched her in the face.

{¶16} Appellant grabbed A.B. by the hands and sat her down on the couch. When A.B. asked to use the bathroom, Appellant walked her to the bathroom and blocked the doorway. A.B. wiped her bloody nose, with a tissue, and threw it in the bathroom trash can. Appellant forced her to the basement, threw a package of zip ties on a table, and asked her to pick her punishment.

{¶17} Appellant forced A.B. to clean out the dog's kennel. He then grabbed her by the loop in the back of her pants and took her back upstairs to the bathroom. He ordered her to get in the shower. She initially refused, then took her clothes off and got in the shower. Appellant got in the shower with her, and forced her to engage in vaginal intercourse. A.B. was crying, but gave up on fighting Appellant.

{¶18} Appellant carried A.B. to the couch, where he got on top of her and forcibly engaged in vaginal intercourse with her a second time. She asked Appellant to stop, and he stopped. Appellant gave her a towel and apologized. He cooked some food which he tried to share with her, and washed her clothes.

{¶19} Appellant agreed to let A.B. go. He walked her to her car. She called her sister and drove to her sister's house. She also called her boyfriend in jail, and the call

was recorded. A.B. was crying and upset in the phone call. Her sister urged her to call the police.

{¶10} A.B. called 911. The dispatcher advised her to go to the hospital. At Mercy Medical Center she was given a sexual assault examination and interviewed by police. A.B. had a broken blood vessel in her eye, pain across her nose, a cut on her lip, and a painful tooth. Photographs of her injuries were taken at the hospital. A.B. was upset and crying while talking to the nurse and to police at the hospital.

{¶11} Detective Joseph Mongold from the Canton Police Department received verbal consent over the telephone from A.B.'s father to search portions of his house. Det. Mongold recovered a bloody tissue from the bathroom trash can. DNA testing revealed DNA from the semen collected from A.B.'s vaginal swabs was consistent with Appellant's DNA by 1 in one trillion.

{¶12} Appellant was indicted by the Stark County Grand Jury with one count of kidnapping and one count of rape. Both counts included repeat violent offender specifications. The case proceeded to jury trial in the Stark County Common Pleas Court.

{¶13} Prior to commencement of trial, the State moved to permit the victim, A.B., to be designated the State's representative and sit at counsel table throughout the trial. The court granted the State's motion.

{¶14} Appellant's position at trial was he engaged in consensual sex with A.B. Appellant did not testify at trial, but presented the testimony of several family members and a friend, who testified Appellant and A.B. had been involved in a sexual relationship, and she did not appear to have physical injuries following the claimed assault.

{¶15} The jury found Appellant guilty of kidnapping and rape, but acquitted Appellant on the sexual motivation specification accompanying the kidnapping charge. The court found Appellant guilty of the repeat violent offender specification. The court sentenced Appellant to ten years incarceration on each count, to be served concurrently, for an aggregate term of ten years.

{¶16} It is from the December 21, 2018 judgment of conviction and sentence Appellant prosecutes his appeal, assigning as error:

I. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATE CONSTITUTION WHEN THE TRIAL COURT ALLOWED THE ALLEGED VICTIM TO REMAIN IN THE COURTROOM AS THE STATE'S DESIGNATED REPRESENTATIVE.

II. APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

III. APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND OF ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE, I, SECTIONS 10 AND 16 OF THE OHIO CONSITUTION [SIC] BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

I.

{¶17} Appellant argues his right to a fair trial was denied because the victim was permitted to be in the courtroom as the State's designated representative throughout the trial.

{¶18} Evid. R. 615 provides in pertinent part:

(A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the "exclusion" or "separation" of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

(B) This rule does not authorize exclusion of any of the following persons from the hearing:

(4) in a criminal proceeding, an alleged victim of the charged offense to the extent that the alleged victim's presence is authorized by statute enacted by the General Assembly or by the Ohio Constitution. As used in this rule, "victim" has the same meaning as in the provisions of the Ohio Constitution providing rights for victims of crimes.

{¶19} Ohio Constitution, Article I, Section 10a, also known as "Marsy's Law," provides in pertinent part:

(A) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused:

(1) to be treated with fairness and respect for the victim's safety, dignity and privacy;

(2) upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings[.]

{¶20} In furtherance of this constitutional provision, R.C. 2930.09 provides for the victim's presence in the court room at any stage of the proceeding:

A victim in a case may be present whenever the defendant or alleged juvenile offender in the case is present during any stage of the case against the defendant or alleged juvenile offender that is conducted on the record, other than a grand jury proceeding, unless the court determines that exclusion of the victim is necessary to protect the defendant's or alleged juvenile offender's right to a fair trial or to a fair delinquency proceeding. At any stage of the case at which the victim is present, the court, at the victim's request, shall permit the victim to be accompanied by an individual to provide support to the victim unless the court determines that exclusion of

the individual is necessary to protect the defendant's or alleged juvenile offender's right to a fair trial or to a fair delinquency proceeding.

{¶21} A decision to allow a victim to remain in the courtroom during a trial is left to the discretion of the trial court. *State v. Klusty*, 5th Dist. Delaware No. 14 CAA 07 0040, 2015-Ohio-2843, ¶ 32. The burden is on the defendant to show the presence of the alleged victim compromised the defendant's right to a fair trial. *State v. Ricco*, 11th Dist. Lake No. 2008-L-169, 2009-Ohio-5894, ¶ 27.

{¶22} In *State v. Maley*, 1st Dist. Hamilton No. C-120599, 2013-Ohio-3452, the appellant made a generalized claim he was prejudiced by the victim's presence in the courtroom. In finding a vague assertion of prejudice was insufficient to require reversal of his conviction, the First District Court of Appeals held:

Maley's argument below, and the argument made here, are nothing more than general assertions that having the victim present and able to hear testimony allowed for the possibility of an unfair trial. If this court were to hold that such an argument is sufficient to prevent the victim from attending court proceedings, it would render the statute meaningless. We hold that for a defendant to show that a victim's presence would result in an unfair trial, she must present particularized evidence that the victim's testimony will be so affected by the victim's presence during the testimony of other witnesses that her right to a fair trial would be violated. General assertions that it is possible are insufficient.

{¶23} *Id.* at ¶ 7.

{¶24} In the instant case, Appellant makes a vague, generalized assertion of prejudice. A.B. was the first witness to testify, and therefore Appellant has not demonstrated prejudice in her ability to hear the testimony of the other witnesses. We find the victim's presence is permitted by both the Ohio Constitution and by statute. The trial court did not err in allowing the victim to sit at counsel table with the prosecutor throughout the trial as the State's representative.

{¶25} The first assignment of error is overruled.

## II.

{¶26} In his second assignment of error, Appellant argues the judgment is against the manifest weight and sufficiency of the evidence.

{¶27} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, *quoting State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983).

{¶28} An appellate court's function when reviewing the sufficiency of the evidence is to determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶29} Appellant was convicted of kidnapping in violation of R.C. 2905.01(A)(4) and/or (B)(2):

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

(2) Restrain another of the other person's liberty.

{¶30} He was also convicted of rape in violation of R.C. 2907.02(A)(2), which provides, "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶31} On March 15, 2018, A.B. testified she was working at Ameridial. Her father called her around 11:00 p.m., asking her to bring him marijuana. Her father and his family were flying to Florida the next morning for vacation. She went to her father's house and

smoked weed with him until around 1:00 a.m. Because of the late hour, A.B. decided to spend the night. She made a bed on the floor and went to sleep.

{¶32} A.B. testified she woke up around 4:00 a.m. when her father told her they were getting ready to leave for the airport. Appellant, who was living at the house, stayed behind. Around 7:00 or 8:00 a.m., she awakened again when she received a call from Strychalski. She fell asleep while on the phone. She was later awakened by Appellant who yelled, "What the F are you here for, why are you here?" Tr. 365. When A.B. tried to get up, Appellant punched her in the face.

{¶33} A.B. testified Appellant grabbed her by the hands and sat her down on the couch. When A.B. asked to use the bathroom, Appellant walked her to the bathroom and blocked the doorway. A.B. wiped her nose, which was bleeding, with a tissue, and threw it in the bathroom trash can. Appellant forced her to the basement, threw a package of zip ties on a table, and asked her to pick her punishment.

{¶34} A.B. testified while in the basement, Appellant forced her to clean out the dog's kennel. He then grabbed her by the loop in the back of her pants and took her back upstairs to the bathroom. He ordered her to get in the shower. She initially refused, then took her clothes off and got in the shower. Appellant got in the shower with her, and forced her to engage in vaginal intercourse. A.B. was crying, but gave up on fighting Appellant.

{¶35} A.B. further testified Appellant carried her to the couch, where he got on top of her and forcibly engaged in vaginal intercourse with her a second time. She asked Appellant to stop, and he stopped. Appellant gave her a towel and apologized. He cooked some food which he tried to share with her, and washed her clothes.

{¶36} A.B. testified Appellant agreed to let her go. He walked her to her car. She called her sister and drove to her sister's house. She also called her boyfriend, and the call was recorded and played for the jury. A.B. was crying and upset in the phone call. Her sister urged her to call the police.

{¶37} A.B. called 911. The dispatcher advised her to go to the hospital. At Mercy Medical Center she was given a sexual assault examination and interviewed by police. The nurse at the hospital testified A.B. had a broken blood vessel in her eye, pain across her nose, a cut on her lip, and a painful tooth. The nurse further testified A.B. was upset and crying during the examination. Photographs of her injuries were taken at the hospital and admitted into evidence.

{¶38} A.B.'s testimony, if believed the jury, was sufficient to convict Appellant of kidnapping and rape. We find the judgment of conviction is supported by sufficient evidence.

{¶39} Appellant argues A.B.'s testimony is not credible because she was angry at him and therefore motivated to make false accusations against him, she did not initially tell her father she had been raped, she left out details when interviewed by police. He presented evidence A.B. and the victim had a sexual relationship. He also presented evidence there was no trail of blood in the house and his witnesses did not see physical evidence she had been struck by Appellant as she claimed at trial.

{¶40} The jury heard both the victim's testimony and the testimony of Appellant's witnesses and chose to believe the testimony of the victim. The mere fact she may have previously been involved in a consensual sexual relationship with Appellant does not mean she consented to sex with Appellant on the day in question.

{¶41} Further, A.B.'s sister, who testified for Appellant, confirmed A.B. called her within minutes after the incident, and A.B. was crying and hysterical. She testified A.B. told her she had been raped. The nurse at Mercy Medical center testified A.B.'s physical injuries to her face were consistent with her account of the incident. Further, police found a tissue with blood on it in the bathroom trash can, which corroborated A.B.'s account of the events.

{¶42} We find the jury did not lose its way in believing the testimony of the victim in the instant case, and the verdict is not against the manifest weight of the evidence.

{¶43} The second assignment of error is overruled.

### III.

{¶44} In his third assignment of error, Appellant argues his trial counsel was ineffective in failing to review the evidence provided by the State in discovery, and creating a hostile environment which negatively impacted the jury's decision.

{¶45} A properly licensed attorney is presumed competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). Therefore, in order to prevail on a claim of ineffective assistance of counsel, Appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). In other words, Appellant must show counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*

{¶46} Appellant first argues counsel was ineffective in failing to review all materials provided by the State in discovery. During discussion concerning clothing taken from the victim at the hospital, the following exchange occurred:

MR. LAGER: Correct me if I'm wrong, and I may be, but was this evidence disclosed in discovery?

MR. BICKIS: Yes.

MR. LAGER: How?

MR. BICKIS: You were given the SANE report which indicates that the clothing was collected by the SANE nurse.

MR. LAGER: By the what?

MR. BICKIS: SANE nurse. And you didn't come over and view any evidence. You were notified there was evidence available.

{¶47} Tr. 611.

{¶48} Appellant has not demonstrated prejudice from counsel's failure to inspect the clothing collected by the SANE nurse. Appellant did not dispute having sex with the victim, but rather argued the sex was consensual. The clothing collected at the hospital was not pertinent to his defense, and we find Appellant has not demonstrated the result of the trial would have been different had counsel inspected the clothing prior to trial.

{¶49} Appellant also argues counsel created a hostile environment by his conduct at trial, directing this court to pages 716-730 of the transcript. During a conversation

outside the presence of the jury regarding the admissibility of the victim's clothing, the court admonished Appellant:

THE COURT: Yeah. I understand that you may choose your words the way that you want to choose them, Mr. Lager, but you, you keep selecting words like "incompetent" and "overzealous" and things that are very personal attacks, and I just feel compelled to explain to you that I am really trying to maintain the decorum here, and those types of words in the, the relationships or the interactions between counsel do not assist the Court in that respect. I'm not asking for a response, I'm just making a statement.

{¶150} Tr. 718.

{¶151} When Appellant took issue with the court's admonishment, she continued:

THE COURT: Okay. And you know what, you are, you are absolutely entitled to take affront to it. However, my comments are based on the continuation of your behavior throughout this case, including the motions which you filed leading up to this case which prompted a conversation that I had to have with you and the prosecutor in my chambers, my extension of my chambers, in pretrial discussions, all right?

\*\*\*

I didn't intend to have a long discussion about it, I didn't intend to incur any ire from you, I am just pointing it out because I'm anticipating that

we are going to get to closing argument at some point today and I do not want this to sort of devolve into something that is a personal attack, all right?

{¶52} Tr. 719-720.

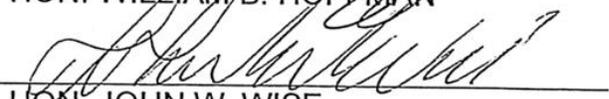
{¶53} While the record demonstrates the trial court instructed Appellant to be more careful about his choice of words during the trial, the record does not reveal counsel made comments in front of the jury which were so inflammatory as to affect the outcome of the proceedings. The portion of the record Appellant cites in support of his claim of ineffective assistance occurred outside the presence of the jury, and we find after review of the transcript of the proceedings, Appellant has not demonstrated but for counsel's behavior, the result of the proceedings would have been different.

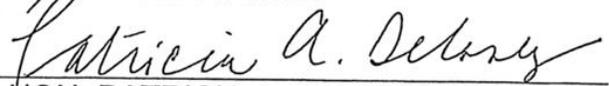
{¶54} The third assignment of error is overruled.

{¶55} The judgment of the Stark County Common Pleas Court is affirmed.

By: Hoffman, P.J.  
Wise, John, J. and  
Delaney, J. concur

  
HON. WILLIAM B. HOFFMAN

  
HON. JOHN W. WISE

  
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

THEODIS MONTGOMERY

Defendant-Appellant

JUDGMENT ENTRY

Case No. 2019CA00012

2019 DEC -9 PM 2:31

COURT OF APPEALS  
STARK COUNTY, OHIO

For the reasons stated in our accompanying Opinion, the judgment of the Stark County Court of Common Pleas, is affirmed. Costs assessed to Appellant.

  
HON. WILLIAM B. HOFFMAN

  
HON. JOHN W. WISE

  
HON. PATRICIA A. DELANEY

# CONSTITUTION OF THE STATE OF FLORIDA

## ARTICLE I

### § 16. [Rights of accused and of victims]

Every victim is entitled to the following rights, beginning at the time of his or her victimization:

- (1) The right to due process and to be treated with fairness and respect for the victim's dignity.
- (2) The right to be free from intimidation, harassment, and abuse.
- (3) The right, within the judicial process, to be reasonably protected from the accused and any person acting on behalf of the accused. However, nothing contained herein is intended to create a special relationship between the crime victim and any law enforcement agency or office absent a special relationship or duty as defined by Florida law.
- (4) The right to have the safety and welfare of the victim and the victim's family considered when setting bail, including setting pretrial release conditions that protect the safety and welfare of the victim and the victim's family.
- (5) The right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim.
- (6) A victim shall have the following specific rights upon request:
  - (a.) The right to reasonable, accurate, and timely notice of, and to be present at, all public proceedings involving the criminal conduct, including, but not limited to trial, plea, sentencing, or adjudication, even if the victim will be a witness at the proceeding, notwithstanding any rule to the contrary. A victim shall also be provided reasonable, accurate, and timely notice of any release or escape of the defendant or delinquent, and any proceeding during which a right of the victim is implicated.
  - (b.) The right to be heard in any public proceeding involving pretrial or other release from any form of legal constraint, plea, sentencing, adjudication, or parole, and any proceeding during which a right of the victim is implicated.
  - (c.) The right to confer with the prosecuting attorney concerning any plea agreements, participation in pretrial diversion programs, release, restitution, sentencing, or any other disposition of the case.
  - (d.) The right to provide information regarding the impact of the offender's conduct on the victim and the victim's family to the individual responsible for conducting any presentence investigation or compiling any presentence

investigation report, and to have any such information considered in any sentencing recommendations submitted to the court.

(e.) The right to receive a copy of any presentence report, and any other report or record relevant to the exercise of a victim's right except for such portions made confidential or exempt by law.

(f.) The right to be informed of the conviction, sentence, adjudication, place and time of incarceration, or other disposition of the convicted offender, any scheduled release date of the offender, and the release of or the escape of the offender from custody.

(g.) The right to be informed of all postconviction processes and procedures. to participate in such processes and procedures, to provide information to the release authority to be considered before any release decision is made, and to be notified of any release decision regarding the offender. The parole or early release authority shall extend the right to be heard to any person harmed by the offender.

(h.) The right to be informed of clemency and expungement procedures. to provide information to the governor, the court, any clemency board and other authority in these procedures, and to have that information considered before a clemency or expungement decision is made: and to be notified of such decision in advance of any release of the offender.

(7) The rights of the victim, as provided in subparagraph (6)a., subparagraph (6)b., or subparagraph (6)c., that apply to any first appearance proceeding are satisfied by a reasonable attempt by the appropriate agency to notify the victim and convey the victim's views to the court.

(8) The right to the prompt return of the victim's property when no longer needed as evidence in the case.

(9) The right to full and timely restitution in every case and from each convicted offender for all losses suffered, both directly and indirectly, by the victim as a result of the criminal conduct.

(10) The right to proceedings free from unreasonable delay, and to a prompt and final conclusion of the case and any related post judgment proceedings.

(a.) The state attorney may file a good faith demand for a speedy trial and the trial court shall hold a calendar call, with notice, within fifteen days of the filing demand, to schedule a trial to commence on a date at least five days but no more than sixty days after the date of the calendar call unless the trial judge enters an order with specific findings of fact justifying a trial date more than sixty days after the calendar call.

(b.) All state-level appeals and collateral attacks on any judgment must be complete within two years from the date of appeal in non-capital cases and within five years from the date of appeal in capital cases, unless a court enters an order with specific findings as to why the court was unable to

comply with this subparagraph and the circumstances causing the delay. Each year, the chief judge of any district court of appeal or the chief justice of the supreme court shall report on a case-by-case basis to the speaker of the house of representatives and the president of the senate all cases where the court entered an order regarding inability to comply with this subparagraph. The legislature may enact legislation to implement this subparagraph.

(11) The right to be informed of these rights and to be informed that victims can seek-the advice of an attorney with respect to their rights. This information shall be made available to the general public and provided to all crime victims in the form of a card or by other means intended to effectively advise the victim of their rights under this section.

# CONSTITUTION OF THE STATE OF OHIO

## ARTICLE I: BILL OF RIGHTS

### § 10a [Rights of victims of crime]

(A) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused:

- (1) to be treated with fairness and respect for the victim's safety, dignity and privacy;
- (2) upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings;
- (3) to be heard in any public proceeding involving release, plea, sentencing, disposition, or parole, or in any public proceeding in which a right of the victim is implicated;
- (4) to reasonable protection from the accused or any person acting on behalf of the accused;
- (5) upon request, to reasonable notice of any release or escape of the accused;
- (6) except as authorized by section 10 of Article I of this constitution, to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused;
- (7) to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim;
- (8) to proceedings free from unreasonable delay and a prompt conclusion of the case;
- (9) upon request, to confer with the attorney for the government; and
- (10) to be informed, in writing, of all rights enumerated in this section.

(B) The victim, the attorney for the government upon request of the victim, or the victim's other lawful representative, in any proceeding involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated, may assert the rights enumerated in this section and any other right afforded to the victim by law. If the relief sought is denied, the victim or the victim's lawful representative may petition the court of appeals for the applicable district, which shall promptly consider and decide the petition.

(C) This section does not create any cause of action for damages or compensation against the state, any political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(D) As used in this section, "victim" means a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the

commission of the offense or act. The term "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor, or incapacitated victim.

(E) All provisions of this section shall be self-executing and severable, and shall supersede all conflicting state laws.

(F) This section shall take effect ninety days after the election at which it was approved.

## **AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES**

### **AMENDMENT VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## **AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES**

### **AMENDMENT XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Code of Alabama

Title 15. Criminal Procedure. (Refs & Annos)

Chapter 14. Trial Arrangements.

Article 4. Crime Victims' Court Attendance. (Refs & Annos)

Ala.Code 1975 § 15-14-53

§ 15-14-53. Right of victim to be present in courtroom.

**Currentness**

The victim of a criminal offense shall be entitled to be present in any court exercising any jurisdiction over such offense and therein to be seated at the counsel table of any prosecutor prosecuting such offense or other attorney representing the government or other persons in whose name such prosecution is brought.

**Credits**

(Acts 1983, No. 83-622, p. 971, § 4.)

Ala. Code 1975 § 15-14-53, AL ST § 15-14-53

Current through Act 2020-206.

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Baldwin's Ohio Revised Code Annotated  
Title XXIX. Crimes--Procedure (Refs & Annos)  
Chapter 2930. Rights of Victims of Crimes (Refs & Annos)

R.C. § 2930.09

2930.09 Right of victim to be present

Currentness

A victim in a case may be present whenever the defendant or alleged juvenile offender in the case is present during any stage of the case against the defendant or alleged juvenile offender that is conducted on the record, other than a grand jury proceeding, unless the court determines that exclusion of the victim is necessary to protect the defendant's or alleged juvenile offender's right to a fair trial or to a fair delinquency proceeding. At any stage of the case at which the victim is present, the court, at the victim's request, shall permit the victim to be accompanied by an individual to provide support to the victim unless the court determines that exclusion of the individual is necessary to protect the defendant's or alleged juvenile offender's right to a fair trial or to a fair delinquency proceeding.

**CREDIT(S)**

(1999 H 3, eff. 11-22-99; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1994 S 186, eff. 10-12-94)

R.C. § 2930.09, OH ST § 2930.09  
Current through File 39 of the 133rd General Assembly (2019-2020).

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West's Arkansas Code Annotated  
Arkansas Rules of Evidence  
Article VI. Witnesses (Rules 601 to 616)

A.R.E. Rule 616

RULE 616. RIGHT OF VICTIM TO BE PRESENT AT HEARING

Currentness

Notwithstanding any provision to the contrary, in any criminal prosecution, the victim of a crime, and in the event that the victim of a crime is a minor child under eighteen (18) years of age, that minor victim's parents, guardian, custodian or other person with custody of the alleged minor victim shall have the right to be present during any hearing, deposition, or trial of the offense.

**Credits**

[Adopted by Acts of 1985, Act 462, § 1. Reenacted by Acts of 1987, Act 876, § 1.]

Rules of Evid., Rule 616, AR R REV Rule 616

Current with amendments received through July 1, 2020.

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Baldwin's Ohio Revised Code Annotated  
Rules of Criminal Procedure (Refs & Annos)

Crim. R. Rule 2

Crim R 2 Definitions

Currentness

As used in these rules:

- (A) “Felony” means an offense defined by law as a felony.
- (B) “Misdemeanor” means an offense defined by law as a misdemeanor.
- (C) “Serious offense” means any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months.
- (D) “Petty offense” means a misdemeanor other than a serious offense.
- (E) “Judge” means judge of the court of common pleas, juvenile court, municipal court, or county court, or the mayor or mayor's court magistrate of a municipal corporation having a mayor's court.
- (F) “Magistrate” means any person appointed by a court pursuant to [Crim. R. 19](#). “Magistrate” does not include an official included within the definition of magistrate contained in [section 2931.01 of the Revised Code](#), or a mayor's court magistrate appointed pursuant to [section 1905.05 of the Revised Code](#).
- (G) “Prosecuting attorney” means the attorney general of this state, the prosecuting attorney of a county, the law director, city solicitor, or other officer who prosecutes a criminal case on behalf of the state or a city, village, township, or other political subdivision, and the assistant or assistants of any of them. As used in [Crim. R. 6](#), “prosecuting attorney” means the attorney general of this state, the prosecuting attorney of a county, and the assistant or assistants of either of them.
- (H) “State” means this state, a county, city, village, township, other political subdivision, or any other entity of this state that may prosecute a criminal action.
- (I) “Clerk of court” means the duly elected or appointed clerk of any court of record, or the deputy clerk, and the mayor or mayor's court magistrate of a municipal corporation having a mayor's court.
- (J) “Law enforcement officer” means a sheriff, deputy sheriff, constable, municipal police officer, marshal, deputy marshal, or state highway patrolman, and also means any officer, agent, or employee of the state or any of its agencies, instrumentalities, or

political subdivisions, upon whom, by statute, the authority to arrest violators is conferred, when the officer, agent, or employee is acting within the limits of statutory authority. The definition of “law enforcement officer” contained in this rule shall not be construed to limit, modify, or expand any statutory definition, to the extent the statutory definition applies to matters not covered by the Rules of Criminal Procedure.

**CREDIT(S)**

(Adopted eff. 7-1-73; amended eff. 7-1-76, 7-1-90)

Rules Crim. Proc., Rule 2, OH ST RCRP Rule 2

Current with amendments received through June 15, 2020.

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Baldwin's Ohio Revised Code Annotated  
Ohio Rules of Evidence (Refs & Annos)  
Article VI Witnesses

Evid. R. Rule 615

Evid R 615 Separation and exclusion of witnesses

Effective: May 1, 2020

[Currentness](#)

**(A)** Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the “exclusion” or “separation” of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

**(B)** This rule does not authorize exclusion of any of the following persons from the hearing:

- (1) a party who is a natural person;
- (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney;
- (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause;
- (4) in a criminal proceeding, an alleged victim of the charged offense to the extent that the alleged victim's presence is authorized by statute enacted by the General Assembly or by the Ohio Constitution. As used in this rule, “victim” has the same meaning as in the provisions of the Ohio Constitution providing rights for victims of crimes.

**CREDIT(S)**

(Adopted eff. 7-1-80; amended eff. 7-1-01, 7-1-03, 7-1-19)

Rules of Evid., Rule 615, OH ST REV Rule 615  
Current with amendments received through June 15, 2020.